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In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

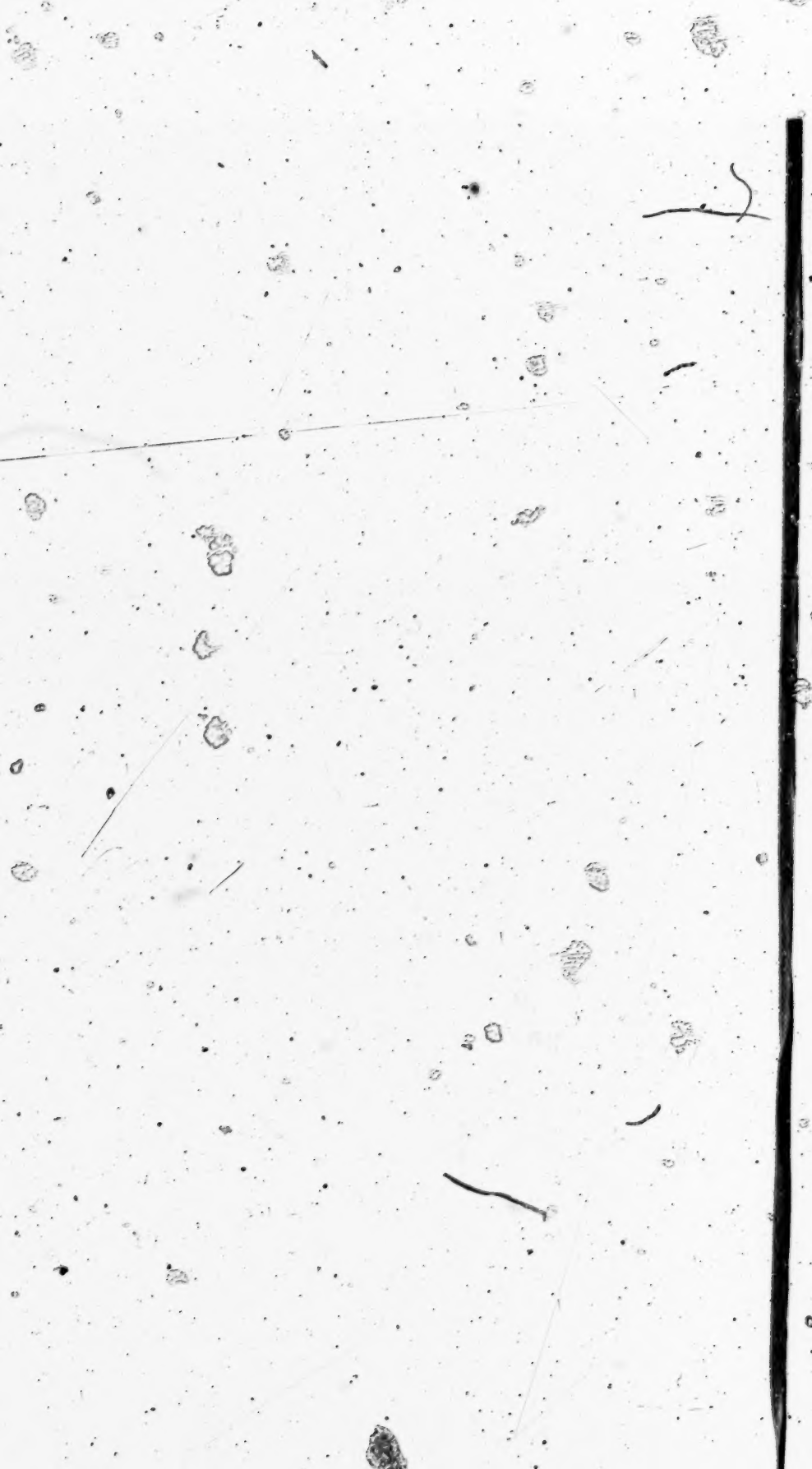
vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

JOHN J. O'TOOLE,
City Attorney of Respondent;
DION R. HOLM,
Assistant City Attorney of Respondent;
ROBERT M. SEARLS,
Special Counsel of Respondent;
GARRET W. McENERNEY,
Counsel for Respondent.



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The statute involved is Section 6 of The Raker Act, approved December 19, 1913 (38 St. 242, R. 12-36, 192-216) which reads as follows (R. 21, 201).:

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

(b) In dealing with Section 6, it is to be noted that the Raker Act is implicit with the idea that the Municipality is to sell or otherwise dispose of water and electric energy, and by explicit command of the Act, the Municipality is required to do so. In Section 6 it is presupposed that this will be done; and that presupposition is the base of the section which in consequence involves an ellipsis 3

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Reply brief for plaintiff (U.S.) February 26, 1938 (D.C.) wherein the Government for the first time suggested or made claim that Section 6 forbids a contract of agency and wherein that claim was made for the first time by anyone 18

(h) The District Court concurred in the interpretation which the Government put upon Section 6, i.e., that it was the purpose thereof and that it did prohibit sale for resale; and while it made mention of the belated argument of the Government that the same section forbade a contract of agency (R. 120 ft. 23 F. Supp. p. 52, lines 3-9) it made no comment upon the soundness thereof 20

(i) The two briefs filed by the Government in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that

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(j) The opinion of the Circuit Court of Appeals states the claims of the parties to the appeal and its conclusions in respect thereof as below 23

(k) In its petition for certiorari, page 8 ft., the Government argued that "the 'Selling' Prohibited [by Section 6] Is Not the Selling of Energy for Resale", a proposition which was never before advanced in the case and which is in diametrical opposition to the positions taken by the Government throughout the litigation and in both of the Courts below 25

(l) In brief for the United States filed March 8, 1940, the Government renews its argument thus made for the first time in the petition for certiorari and claims that the selling prohibited is not a selling of energy for resale. The language is not exactly the same but the plain effect is identical 26

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4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not

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require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof..... 58

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was had there. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a Prohibition of sale for resale (and nothing more)..... 61

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(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale (and nothing more) and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type. Moreover, through the hearings in the District Court and in the Circuit Court of Appeals the Government continued to maintain that Section 6 forbids sale for resale 75

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action 76

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F. (2d) 575, c. 4, lines 19-29; R. 676-677; 106 F. (2d) 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does

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not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. CCA. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20 80

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U. S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition 91

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them 94

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency 96

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(b) In drafting the agreement the parties were alive to the provisions of Section 6 of the Raker Act and intended to make the contract one of agency

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(d) Not only did the parties have the general purpose to make the contract one of agency but in all of the provisions thereof they manifested this purpose 115

(e) Inasmuch as it has now been made clear (so we submit) that the parties intended from the beginning to the end to make a contract of agency which would not violate the Raker Act, and were not seeking to make a contract of sale which they knew would be invalid, because in violation of the Act, it is important here to point out that they did not fail of their purpose in the draftsmanship of the contract, and that there is no theory of interpretation which would lead logically to that conclusion 117

(f) The attendant circumstances reenforce the incontrovertible and undisputed fact that the parties throughout their negotiations and in the actual execution of the contract, and in the events which immediately thereafter transpired, manifested their purpose that the contract should be one of agency and lawful under the Raker Act and not one of sale which they knew would be prohibited thereby 119

(g) There is no justification whatever for the position taken in Brief for the United States, page 23, footnote 12, which would deny the applicability here of the rule that the intention of the parties to a contract must be effectuated based upon the false premise that the parties to the contract of July 1, 1925 "use terms to avoid the requirements of the law" and in the preparation of the

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(h) There is nothing in this case to justify the idea that by the contract the parties intended that the Municipality should "for a consideration" grant to the Company or endow it or vest in it a right to sell, nor that the consideration which the Government spells from the contract was intended to be such by either the Company or the Municipality 123

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13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful 163

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Frontispiece.

THE GENESIS OF SECTION 6 OF THE RAKER ACT.*

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

"... that ... the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

"Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

April 7, 1913: Earliest Form of Section 6 of the Raker Act, H. R. 112, 63rd Congress, 1st Session.

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county."

December 19, 1913: The Raker Act (38 Stat. 242).

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

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*We refer throughout to the first clause of Section 6.

PRESIDENT THEODORE ROOSEVELT'S DICTATION FOR INCLUSION IN THE OWENS RIVER GRANT; SECTION 6 OF THAT GRANT; AND SECTION 6 OF THE RAKER ACT READ DISTRIBUTIVELY.

President Theodore Roosevelt's Dictation.

Selling Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever selling . . . to any corporation or individual . . . the right for that corporation or that individual itself to sell . . . the water given to it or him by the City for irrigation purposes."

Letting Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever . . . letting to any corporation or individual . . . the right for that corporation or that individual itself to . . . sublet the water given to it or him by the City for irrigation purposes."

Section 6 of The Owens River Grant.

Selling Water:

"That the city of Los Angeles is prohibited from ever selling . . . to any corporation or individual, . . . the right for such corporation or individual to sell . . . the water sold . . . to it or him by the city."

Letting Water:

"That the city of Los Angeles is prohibited from ever . . . letting to any corporation or individual, . . . the right for such corporation or individual to . . . sublet the water . . . given to it or him by the city."

Section 6 of The Raker Act.

Selling Water:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the water . . . sold . . . to it or him by the said grantee [San Francisco]."

Letting Water:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet the water . . . given to it or him by the said grantee [San Francisco]."

Selling Electric Energy:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the electric energy sold . . . to it or him by the said grantee [San Francisco]."

Letting Electric Energy:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet . . . the electric energy . . . given to it or him by the said grantee [San Francisco]."

SECTION 6 OF THE RAKER ACT INVOLVES AN ELLIPSIS (SO WE SUBMIT), AND AS "THERE IS NO CANON AGAINST MAKING EXPLICIT WHAT IS IMPLIED" (UNITED STATES v. SISCHO, 262 U. S. 165, 169, OPINION BY MR. JUSTICE HOLMES (1923)), WE SUPPLY THE OMISSION IN FOUR DIFFERENT VERSIONS WHICH FOLLOW.*

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Third Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Fourth Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to [re]sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

*See preceding three pages for genesis of Section 6, and for the reading thereof and of its prototypes distributively.

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

JURISDICTION AND OPINIONS BELOW.

Certiorari was granted January 29, 1940 (308 U. S.....) to review a decree of the Circuit Court of Appeals for the Ninth Circuit (R. 678)[1] reversing a decree of the United States District Court for the Northern District of California, Southern Division, (R. 168)[2] whereby an injunction was granted in favor of the United States and

[1]Opinion R. 661-677; 106 F.2d 569.
[2]Opinion R. 90-125; 23 F. Supp. 40.

against the City and County of San Francisco, forbidding the further execution of a day to day contract made by the latter July 1, 1925 with Pacific Gas & Electric Company for distribution of municipally owned electric energy to the inhabitants of the Municipality.[3] The decree and injunction of the District Court were based upon a ruling that the contract is one of sale for resale and not one of agency and, therefore, in violation of the statute involved.[4]

STATUTE INVOLVED.

We give below the text and add considerations properly to be taken into account therewith.

(a) The Text.

The statute involved is Section 6 of The Raker Act, approved December 19, 1913 (38 St. 242, R. 12-36, 192-216) which reads as follows (R. 21, 201):

> "Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."[5]

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[3] A copy of the Contract of July 1, 1925 is set out in the Appendix to this Brief pp. i to xii.

[4] In the opinion of the District Court this is stated to be the chief issue in the case. See R. 97, lines 19-23; 23 F. Supp. p. 44, c. 2, lines 7-12; R. 106, line 22 to 107, line 13; 23 F. Supp. p. 47, c. 1, line 45 to c. 2, line 10. The language of the District Court is quoted infra, pp. 20-22.

[5] Except where it is specifically stated otherwise, we refer throughout to the first clause of Section 6. The Government correctly noted in one of its briefs below: "The second clause of section 6, stated in the form of a proviso, plainly does not relate to the same subject matter as, or restrain, modify, or

(b) In Dealing With Section 6, It Is To Be Noted That the Raker Act Is Implicit With the Idea That the Municipality Is to Sell or Otherwise Dispose of Water and Electric Energy; and by Explicit Command of the Act, the Municipality Is Required To Do So. In Section 6 It Is Presupposed That This Will Be Done; and That Presupposition Is the Base of the Section Which in Consequence Involves an Ellipsis.

The Raker Act was designed (after making due provision for the prior rights of irrigation districts mentioned therein) to aid the Municipality in securing water and electric energy for its inhabitants. These commodities were to be sold by the Municipality, as will be noted in several provisions of the Act (Raker Act, Sections 1, 6, 9(l), (m), (n) and (o), in respect of electricity; and Sections 1, 6, 9(d), (l), (q) and (u) in respect of water).

It was on the basis of this dominant idea that Section 6 was introduced into the Act. In Section 6 it is presupposed that sales or other dispositions of both commodities will occur.

The section therefore involves an ellipsis[6] (so we submit) and as "there is no canon against making explicit what is implied" (*United States v. Sischo*, 262 U.S. 165, 169, opinion by Mr. Justice Holmes (1923)) we supply the omission in four different versions which follow.

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otherwise affect, **the first clause**. The word 'Provided' has no significance here, simply serving to separate or distinguish the two clauses" (Govt. Supp. Br. CCA, p. 18, line 30 to p. 19, line 3. See footnote 7 for reference to this and the other briefs of the Government filed below).

[6]Lippincott's Estate, 276 Pa. 283, 288, line 6, 120 Atl. 136, 137, c. 2 ft. (1923). See, also, Add. Br. Opp. Cert. p. 9 fn. 4.

In some instances, an ellipsis consists in the omission later of what had been expressed before; but the same rule is applicable of course where the omission of words is at the beginning but clearly indicated by what follows, as in the present case.

The Ellipsis: Two Versions:

"Sec. 6. That [in selling or letting water or electric energy] [or] [in sales or leases of water or electric energy] the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Third Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting [any water or electric energy] to any corporation or individual, except a municipality or a municipal water district or irrigation district, [with] the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee [San Francisco]."

The Ellipsis: Fourth Version.

"Sec. 6. That the grantee [San Francisco] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to [re]sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The words supplied by us above do no more than express the interpretation of Section 6 put upon it by the Government in the language quoted infra from its first and last briefs filed below.[7]

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[7]The Government submitted two printed briefs in the District Court, November 1, 1937 and February 26, 1938, and two in the

(c) The Position of the Government Below Respecting Section 6 Gave to it a Reading in Full Harmony With the Reading Which We Give the Section by the Addition of the Above Words Supplied by Us as Upon an Ellipsis.

Later, infra, pages 12-20, we give a full account of how the Government interpreted Section 6 below and show that its interpretation there always was in harmony with the reading which we give the section by the addition of the above words; but presently we do no more than quote from the first brief filed by the Government in the District Court and the last brief filed by it in the Circuit Court of Appeals.

Brief for Plaintiff (U.S.) November 1, 1937 (D.C.)

"It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified." (p. 58, lines 15-16, 19-23).

Govt. Supp. Br. C.C.A., July 10, 1939.

"The right to sell, granting of which is prohibited by section 6, is . . . the right to sell the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 3-7).

Circuit Court of Appeals, March 14 and July 10, 1939. The later entitled "Supplemental Brief for Appellee United States" is referred to as "Govt. Supp. Br. C.C.A. July 10, 1939". Certified copies of the four briefs are on file with the Clerk. Nine additional copies of each of them are also on file except of the first brief, that submitted in the District Court November 1, 1937, of which no additional copies were filed because they were not available.

"Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States" (p. 4, lines 8-11).

"Sale for resale is prohibited" (p. 6, line 5).

"[Any suggestion which] implies that sale for resale under certain circumstances is not prohibited, is [untenable]" (p. 6, lines 6-8).

"Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any private corporation or individual of an unrestricted ownership of the energy or water" (p. 6, line 27 to p. 7, line 2).

"Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell" (p. 7, lines 2 to 4).

"The statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed" (p. 7, lines 10-15).

"The prohibition of the statute is against the granting to an individual or private corporation of the right to sell" (p. 8, lines 19 to 21) "the Hetch Hetchy water or energy obtained from the City" (p. 4, lines 6 and 7).

"Section 6 of the Raker Act prohibits sale for resale" (p. 9, lines 4-5).

"The breach occurs not in the sale, but in transferring with it the right to sell" (p. 9, lines 11-13).

(d) The Genesis of Section 6.

Section 6 of the Raker Act was copied from Section 6 of The Owens River Grant to Los Angeles, approved June 30, 1906 (34 Stat. 801) which had been incorporated in that grant at the request of President Theodore Roosevelt and in words found in a dictated letter from him to the Secretary of the Interior dated June 25, 1906 (R. 657, 659-660), five days before the measure was passed and approved by him.

The Dictation of President Theodore Roosevelt and the language of Section 6 of The Owens River Grant to Los Angeles are as follows:

June 25, 1906: President Theodore Roosevelt's Dictation for Inclusion in The Owens River Grant to Los Angeles (R. 657, 659-660).

> "... that ... the City of Los Angeles [is prohibited from] ever selling or letting to any corporation or individual except a municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the City for irrigation purposes."

June 30, 1906: The Owens River Grant to Los Angeles (34 Stat. 801, 803).

> "Sec. 6. That the city of Los Angeles is prohibited from ever selling or letting to any corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city."

The differences in the language of the Dictation, The Owens River Grant, and The Raker Act are brought out in the contrasts which follow.

Contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, and Contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant.

The departures from President Theodore Roosevelt's Dictation in the drafting of Section 6 of The Owens River Grant follow: The Dictation is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "[Sec. 6] That the City of Los Angeles is prohibited from ever selling or letting to any corporation or individual except a municipality, the right for ~~that~~ [such] corporation or ~~that~~ individual ~~itself~~ to sell or sublet the water [sold or] given to it or him by the City ~~for irrigation purposes~~."

The departures from Section 6 of The Owens River Grant in the drafting of Section 6 of the Raker Act follow. Section 6 of The Owens River Grant is the base. Deletions are indicated. Additions are shown by bracketed and underlined words.

> "Sec. 6. That the ~~city of Los Angeles~~ [grantee] is prohibited from ever selling or letting to any corporation or individual, except a municipality [or a municipal water district or irrigation district] the right ~~for such corporation or individual~~[8] to sell or

[8]The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the Bill then under consideration (7207) and which later became a law, on motion of Representative Murray of Oklahoma on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

sublet the water [or the electric energy][9] sold or given to it or him by the ~~city~~ [said grantee]."

(e) The interrelation of President Theodore Roosevelt's Dictation and Section 6 of both The Owens River Grant and The Raker Act, and the meaning of the three forms, will be all the clearer if each of them is read distributively.

As will be noted supra, p. 7, neither the Dictation of President Theodore Roosevelt nor Section 6 of The Owens River Grant mentioned "electric energy" but both dealt with "selling" and "letting" "water".

Section 6 of the proposed Raker Act did not mention "electric energy" until those words were introduced therein late in the enactment of the measure, as shown in footnote 9. Thenceforth, the section dealt with "selling" and "letting" "water" and "electric energy".

Section 6 and Its Prototypes Read Distributively.

We give now each of the three forms if read distributively.

President Theodore Roosevelt's Dictation.

Selling Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever selling . . . to any corporation or individual . . . the right for that corporation or

[9]When this bill was being considered by the committee, I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2 ft.)

The Bill thus amended in Committee at the suggestion of Representative Thomson was H.R. 6914, introduced July 18, 1913, which did not contain the words "or the electric energy" when introduced. The later Bill, H.R. 7207, introduced August 1, 1913, which became The Raker Act, did contain the words. Representative Thomson's amendment was therefore addressed to the earlier of these two bills.

that individual itself to sell . . . the water given to it or him by the City for irrigation purposes."

Letting Water:

". . . that . . . the City of Los Angeles [is prohibited from] ever . . . letting to any corporation or individual . . . the right for that corporation or that individual itself to . . . sublet the water given to it or him by the City for irrigation purposes."

Section 6 of The Owens River Grant.

Selling Water:

"That the city of Los Angeles is prohibited from ever selling . . . to any corporation or individual, . . . the right for such corporation or individual to sell . . . the water sold . . . to it or him by the city."

Letting Water:

"That the city of Los Angeles is prohibited from ever . . . letting to any corporation or individual, . . . the right for such corporation or individual to . . . sublet the water . . . given to it or him by the city."

Section 6 of The Raker Act.

Selling Water:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual. . . . the right to sell . . . the water . . . sold . . . to it or him by the said grantee [San Francisco]."

Letting Water:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet the water . . . given to it or him by the said grantee [San Francisco]."

Selling Electric Energy:

"That the grantee [San Francisco] is prohibited from ever selling . . . to any corporation or individual, . . . the right to sell . . . the electric energy sold . . . to it or him by the said grantee [San Francisco]."

Letting Electric Energy:

"That the grantee [San Francisco] is prohibited from ever . . . letting to any corporation or individual, . . . the right to . . . sublet . . . the electric energy . . . given to it or him by the said grantee [San Francisco]."

(f) The Several Hetch Hetchy Bills Introduced by Representative Raker in the 63rd Congress, 1st Session (1913).

As stated in footnote 8, Mr. Raker introduced five Hetch Hetchy Bills in the 63rd Congress, 1st Session. All of them were referred to the House Committee on the Public Lands and the proceedings in respect thereof appear in 50 and 51 Congressional Record.

The Bills were these (1) H.R. 112, introduced April 7, 1913; (2) H.R. 4319, introduced April 25, 1913; (3) H.R. 6281, introduced June 23, 1913; (4) H.R. 6914, introduced July 18, 1913; and (5) H.R. 7207, introduced August 1, 1913, which later became The Raker Act, approved December 19, 1913.[10]

After he had introduced the fifth Bill, which, following amendments, became The Raker Act, Mr. Raker explained that he had introduced these several Bills successively to

[10]The text of Section 6 in each of these five Bills is set out in the Appendix hereto, p. xviii. The first four Bills follow Section 6 of The Owens River Grant and do not involve any departures of consequence. The first of the Raker Bills, as introduced, which included in Section 6 the words "or electric energy" was the fifth.

take in amendments and suggestions which had been offered or were made in the intervals between the introduction of one bill and the next (50 Cong. Rec. p. 3900, c. 1 foot). After introducing the second of these five Bills (H.R. 4319, April 25, 1913) Mr. Raker on May 29, 1913 (50 Cong. Rec. 1825, c. 1 ft.) asked "unanimous consent to have printed in the Record, in parallel columns, the bill H.R. 4319 and the grant to Los Angeles, so as to show a comparison of the two, with a summary of points of difference between the two bills", which was given. Thereupon the two measures, The Owens River Grant (34 St. 801) and H.R. 4319 were printed in the Record in parallel columns under the entitlement "A statement showing that the proposed grant to San Francisco of right of way privileges through the public lands for the purpose of a municipal water supply as contained in House Bill 4319, introduced in the House of Representatives April 25, 1913, is substantially the same as the grant made by Congress to the City of Los Angeles for its municipal water supply" (50 Cong. Rec. p. 1825-27).

Section 6 of The Owens River Grant and Section 6 of the proposed grant to San Francisco and all other corresponding sections were printed in juxtaposition.

(g) Throughout the Course of This Action in the District Court, the Government Maintained an Interpretation of Section 6 in Full Harmony With the Reading Which We Give the Section After Supplying the Omitted Words as Upon an Ellipsis, Supra, p. 4.

We start with the Complaint filed April 27, 1937, to which a copy of the Raker Act was attached as an exhibit. No copy of the Contract of July 1, 1925, was attached. We assume that a copy of the Contract was

omitted against the possibility that if pleaded the case might have gone off on motion to dismiss through a ruling that the contract was one of agency and did not violate Section 6 of the Raker Act which forbade sale for resale and nothing more. The absence of the Contract from the Complaint, however, serves to accentuate and brings out in striking relief the theory of the action, i. e., (a) that Section 6 of the Raker Act forbade sale for resale; and (b) that the contract under attack was one of sale for resale.

The following are pertinent provisions of the complaint:

Complaint.

Paragraphs VIII, IX and XVIII of the Complaint read as follows (R. 6, 9, 39):

"VIII. That defendant is now and since on or about June 29, 1925 has been enjoying using and occupying the said rights, easements and lands of plaintiff in evasion of and contrary to the aforesaid terms and conditions of said Act, more particularly section 6 thereof, in this that the defendant has since said date been and now is selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said corporation resell the same to its customer consumers, including[11] the people of said defendant;"

"IX. That from time to time since June 29, 1925, the Secretary of the Interior has represented to defendant that its sale of said electric power to said

[11]The word "including" was added by amendment filed June 25, 1937 (R. 39, ls. 1-3).

Pacific Gas & Electric Company was in evasion of and contrary to the terms and conditions of said Act and has requested that defendant cease and desist from said practice;"

"XVIII. That under color of said Act the defendant will continue as aforesaid to wrongfully enjoy, use and occupy said rights, easements and lands, and to sell to said corporation for resale the electric power thereby and thereon generated, and will thereby continue to defraud and damage plaintiff, unless and until restrained by your Honorable Court, and that the continuance of said trespasses and operations will work great and irreparable damage to plaintiff unless restrained;"

Government's Opening Statement at Final Hearing.

On July 20, 1937, the Municipality filed its Answer to the Complaint (R. 41-90), with a copy of the Contract of July 1, 1925, attached as an exhibit (R. 76). Thus the contract was before the Court at the time of the final hearing in the District Court which occupied October 19, 20 and 21, 1937 (R. 189-192). In making his Opening Statement the United States Attorney said:

"The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. If the evidence shows a violation by the City and County of San Francisco of the provisions of Section 6 of the Raker Act, the Government asks this Court to make a finding that this contract entered into on July 1, 1925 between the City and County of San Francisco and Pacific Gas & Electric Company is a contract of sale, and is violative of the provisions of Section 6 of the Raker Act, and enjoining the City and County of San Francisco from continuing to sell power for

purposes of resale pursuant to the terms of that contract to the Pacific Gas & Electric Company, or to anybody else." (R. 189:28-190:14).

"Briefly, that is the issue in this case: Is this contract entered into by the City and County of San Francisco on July 1, 1925, a contract of agency, a contract merely by which the City and County of San Francisco consigns to the Pacific Gas & Electric Company as its agent certain power for distribution, or is it a sale of power by the City and County of San Francisco to the Pacific Gas & Electric Company for a definite sum to be paid monthly and thereafter sold by the Pacific Gas & Electric Company to its consumers . . ." (R. 191:27-192:8).

". . . this contract is not a contract of consignment, and is not a contract of agency, but is a contract for the sale of the electric energy . . . to the Pacific Gas & Electric Company for the purpose of resale, and that the sale of this energy [the Government contends] to the Pacific Gas & Electric Company for the purpose of resale is violative of the provisions of Section 6 of the Raker Act." (R. 191:4-14).

Government's Position Through the Final Hearing.

During the final hearing the Government offered in evidence the Contract of July 1, 1925 (R. 223) and it was marked "U. S. Exhibit 6", the text whereof appears in the Appendix to this Brief, p. i. Later, the United States Attorney said:

"The question before this Court, as I understand it, is whether this is an agency contract or whether it is not an agency . . ." (R. 341:6-9).

"If it is an agency contract and the P. G. & E. as the agent is serving the City and County of San Fran-

cisco instead of buying it might be that the Raker Act is not being violated." (R. 341:13-17).

Following the conclusion of the final hearing October 21, 1937, the Government filed its opening "Brief for Plaintiff" November 1, 1937. The Municipality filed its "Brief for Defendant" December 20, 1937, and the Government filed its "Reply Brief for Plaintiff" February 26, 1938.

Brief for Plaintiff (U. S.) November 1, 1937 (D. C.).

In addition to the quotation from the Brief of November 1, 1937, supra, p. 5, dealing with the interpretation of Section 6, the following are to be added as affording like interpretation.

"Section 6 of the Raker Act is a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale." (53:16-19)

"Section 6 of the Raker Act constitutes a prohibition or covenant against the sale of electric energy, generated by the defendant on the Hetch Hetchy project, to any private person or corporation for the purpose of resale." (53:20-24)

"The real question is whether the sale or disposition of that energy by the defendant under conditions necessarily contemplating its resale to consumers is in derogation of Section 6 of the Raker Act." (54:29-55:2)

". . . . Section 6 prohibits the sale of electric energy to a private person or corporation, such as the Pacific Gas and Electric Company, for the purpose of resale." (56:10-12)

"It is submitted that the language of Section 6 is a clear and unequivocal prohibition against sale to a private person or corporation of the right to resell the electric energy generated on the Hetch Hetchy Project; a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale." (58:15-21)

"[Congress] prescribed in Section 6 that those lands could not be used for the generation or transmission of energy to be sold to a private party for resale." (60:4-7)

The portions of the Brief of November 1, 1937, which bear upon the interpretation of the Contract also carry by implication a like interpretation of Section 6. Accordingly, we quote as below:

"In the disposition of electric energy under the contract of July 1, 1925, with the Pacific Gas and Electric Company, the defendant is selling Hetch Hetchy energy to the company for the purpose of resale as prohibited by Section 6 of the Raker Act." (67:22-27)

". . . the language of consignment is used throughout the contract of July 1, 1925, between the defendant and the Pacific Gas and Electric Company. If the contract truly be one of consignment or agency, then the power distributed to consumers by the company as a result of that contract is distributed for and on behalf of the defendant and the full transaction is one of sale directly by the defendant, acting through its agent, to the consumer." (67:28-68:7)

"If, however, the contract is not truly one of consignment or agency, it is one of sale of the energy to the Pacific Gas and Electric Company and as such

it constitutes a violation of Section 6 of the Raker Act, for as such it clearly is a contract contemplating resale of the energy by the private corporation to the ultimate consumers, its customers. It is respectfully submitted that the contract is clearly of the latter type and that, consequently, a violation of the statutory prohibition exists." (68:7-16)

". . . there can be no doubt that the contract is one of sale for resale rather than one of consignment or agency." (73:3-5)

". . . the transaction is in fact one of sale to the company for the purpose of resale." (72:29-31)

". . . there can also be no doubt that the transaction is one of sale to the company for resale." (75:8-10)

". . . the transaction between the parties is actually one of sale for the purpose of resale." (78:24-25)

"It is respectfully urged that the foregoing authorities and arguments are conclusive in establishing:

2. That the Raker Act contains a valid prohibition against the sale of electric energy to a private person or corporation for the purpose of resale; and

3. That the defendant is selling energy generated on the Hetch Hetchy project to a private corporation, the Pacific Gas and Electric Company, for the purpose of resale in direct violation of the statute." (83:9-25)

Reply Brief for Plaintiff (U.S.) February 26, 1938 (D.C.) wherein the Government for the first time suggested or made claim that Section 6 forbids a contract of agency and wherein that claim was made for the first time by anyone.

The brief of the Government filed in the District Court November 1, 1937 was followed by Brief for Defendant

(the Municipality) submitted December 20, 1937, wherein it was said (p. 22, lines 12-15):

> "The Government concedes (so we understand) that an agency contract does not violate the Raker Act but contends that the contract under review is not an agency contract."

Then came the Reply Brief for Plaintiff wherein, for the first time the Government made the contention that Section 6 forbids a contract of agency, and wherein as will be noted, the Government explicitly stated that this was a new contention. (Indeed it was one never before put forward.)

The brief said (pp. 17-18):

> "Section 6 of the Raker Act is violated by the selling or letting to the company of the right to sell power generated at Hetch Hetchy, whether or not accompanied by transfer to the company of title to the power itself. This argument may be regarded as a new contention on the part of the United States, particularly in view of the statement of the issue in the opening statement for the plaintiff [R. pp. 189-192, particularly R. 189:28-190:14, and R. 191:27-192:10, the pertinent quotations from which appear supra, p. 14]. It is, therefore, recognized and conceded that the defendant may file reply thereto as it may be advised."

The argument thus advanced was indeed "a new contention on the part of the United States" for it had never been brought forward or suggested before by the Government or anyone else. Moreover, the Complaint was not drawn on any theory having to do with agency because, as already stated, the Contract was not attached to the

Complaint as an exhibit and the allegations in respect thereof were all to the effect that the contract was one of sale for resale thereby excluding the idea that it contained anything respecting agency.

Note may be here taken, though it is somewhat anticipatory, that in Brief for the United States it is said: "While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City it does contend" etc. (p. 12.)

(h) The District Court Concurred in the Interpretation Which the Government Put Upon Section 6, i.e., That It Was the Purpose Thereof and That It Did Prohibit Sale for Resale; and While It Made Mention of the Belated Argument of the Government That the Same Section Forbade a Contract of Agency (R. 120 ft. 23 F. Supp. p. 52, lines 3-9) It Made no Comment Upon the Soundness Thereof.

The District Court said:

"The complaint of the Government alleges that the City is presently selling the electric power, generated by utilization of the grants of the Raker Act, to the P. G. & E. for resale, and that such activity is in violation of the limiting provision of section 6 of the Act." (R. 93:5-10; 23 F. Supp. 43, c. 1, lines 19-25.)

"The City . . . sets up the contract with the Company as Exhibit 'A' of its answer as a primary defense for the activity which the Government contends is a sale for resale." (R. 93:10-13; 23 F. Supp. 43, c. 1, lines 25-30.)

". . . the Secretary must start proceedings through the Attorney General, if the Act is being violated by a sale of electricity to a private company for purposes of resale." (R. 96, ftn. 4; 23 F. Supp. 44, ftn. 4.)

"The chief issue to be settled by the court in the present controversy is this: Does the City's present disposal of electric power under the contract of July 1, 1925, made by the City and the Company, violate Section 6 of the Raker Act?" (R. 97:19-23; 23 F. Supp. p. 44, c. 2, lines 7-12).

Again:

"[The court must] turn to the agreement between the City and the Company to determine whether it is a contract for the sale of electricity for resale or a contract of agency, whereby the City distributes its own power through an agent. . . . The Government has alleged that the City is not distributing energy through the Company as an agent, but is selling electricity to it for resale in violation of section 6 of the Raker Act. The City denies this allegation and contends that it has entered into an agency agreement whereby it distributes its own power." (R. 106:22-107:13; 23 F. Supp. p. 47, c. 1, line 45, to c. 2, line 10.)

Again:

"[In Los Angeles Gas & Electric Corporation v. Los Angeles, 188 Cal. 307 (1922)] a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, **as in this case**, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that

the city charter was not being violated." (R. 113:18-29; 23 F. Supp. p. 49, c. 2, lines 19-33.)

Also:

"The contract of July 1, 1925, was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act [and] became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in section 6 of the act." (R. 95:19; 97:2; 23 F. Supp. p. 44, c. 1, line 1: line 40.)

Also:

"Section 6 does not permit a sale of electricity to a private corporation for purposes of resale." (R. 124: 25-27; 23 F. Supp. 53, c. 1, ls. 34-36.)

(i) The two briefs filed by the Government in the Circuit Court of Appeals on March 14, 1939 and July 10, 1939, maintained its position unbrokenly that it was the purpose of Section 6 to forbid and that it did forbid sale for resale.

We need not go over these two briefs to establish the proposition just stated because we take the second of the two briefs as indicating the line of argument in the first, and the extracts from the latter brief, supra, pp. 5-6, show that the Government therein repeatedly asserted that it was the purpose of Section 6 to and that it forbade sale for resale.

Furthermore, the position taken by the Government is well stated in the opinion of the Circuit Court of Appeals, to which we now come.

(j) The Opinion of the Circuit Court of Appeals States the Claims of the Parties to the Appeal and Its Conclusions in Respect Thereof as below.

The contentions are thus stated (R. 666, 106 F.2d 572, c. 2, lines 1 to 19 and footnote 4 of that Opinion):

"The claim of the United States is that the disposition of electric energy by the contract of July 1, 1925, is a sale of energy to the Company for resale purposes and, consequently, it is a violation of Section 6 of the Raker Act. It is also contended that even if the contract be construed as an agency agreement there is still a violation of the Raker Act by the City since it is claimed there was granted to the Company for a consideration the right as agent to sell the energy.

The City, on the other hand, contends that the contract between it and the Company was an agency contract whereby the Company was employed as agent of the City to distribute the electric energy for it and that such an agency contract does not violate Section 6 of the Raker Act." (Footnote 4: "The City has made other contentions which, in view of the conclusions of this Court, are not necessary to consider.")

The conclusions of the Court were these (R. 674, 106 F.2d 575, c. 1, lines 12-32):

"We conclude that there was no sale made by the City to the Company of the electric energy distributed to the customers in San Francisco and that the contract was one by which the City employed the Company to transmit the City's power to the consumers thereof in the City.

The contention of the United States that the Raker Act forbids the City from contracting with a private company for the distribution of the electric energy

by such company as agent for the City is clearly without merit. There is nothing in Section 6 of the Act prohibiting the City from distributing the energy by an agent. It is elementary, of course, that a sale by an agent is the sale of the principal.

We conclude that the City did not violate Section 6 of the Raker Act by making a sale of electric energy to the Company."

In another connection, the Court stated (R. 675:2-5; 106 F.2d 575, c. 1, lines 41-45):

"The United States contended at the hearing and in its opening brief that what was prohibited by Section 6 was a sale for resale purposes. This was not disputed by appellant in its briefs."

Again (R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10):

"The City, in its brief submitted after the argument, contends that Section 6 of the Raker Act prohibits a sale of electric energy for resale. It states: 'The government and the municipality are agreed that Section 6 prohibits sale for resale.'

The United States, in its brief submitted after argument, states: 'The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City.'

It concedes, however, that the Act 'did not prohibit employment of an agent for transmission purposes.'

In view of the position of the City that the Act prohibits a sale for resale, we base our decision upon

the sole ground that the contract between the City and the Company was an agency agreement and not a contract of sale.

As to the contention of the United States, reasserted and amplified in its brief after argument, that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City for disposition of the energy on its behalf, it is sufficient to point out that what we have already said disposes of this question. We point out further, however, that there are no words contained in Section 6, supra, that are appropriate to prohibit such an arrangement. The United States relies much on the fact that Section 6 prohibits not only 'selling' the 'right to sell' but also prohibits 'letting' that right. But the term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

(k) In Its Petition for Certiorari, Page 8 ft., the Government Argued That "the 'Selling' Prohibited [by Section 6] Is Not the Selling of Energy for Resale", a Proposition Which Was Never Before Advanced in the Case and Which Is in Diametrical Opposition to the Positions Taken by the Government Throughout the Litigation and in Both of the Courts Below.

The proposition stated in the Petition, page 8 foot, that "the 'selling' prohibited is not the selling of energy for resale" was never before advanced in this case, and is diametrically contrary to the position taken by the Government in the District Court (1) in the complaint filed therein; (2) in the opening statement at the final hearing; (3) in its position stated anew by counsel through the final hearing (October 19, 20, 21, 1937) (in arguments

respecting the admission and rejection of evidence); and (4) in its two printed briefs there submitted November 1, 1937, and February 26, 1938; and to the position taken by the Government in its two briefs filed in the Circuit Court of Appeals, March 14 and July 10, 1939, notably the latter, i.e., "Supplemental Brief for Appellee United States" (Govt. Supp. Br. C. C. A.) and in oral argument in that case.

This is all made abundantly clear by the occurrences in the course of the action fully detailed in subdivisions (g), (h), (i) and (j) supra, pp. 12-22.

We shall later argue that in these circumstances the Government should not be heard here to make the argument thus made for the first time in the Petition for Certiorari and which is diametrically opposed to its position in both courts below throughout the course of this action.

(l) In Brief for the United States Filed March 8, 1940, the Government Renews Its Argument Thus Made for the First Time in the Petition for Certiorari and Claims That the Selling Prohibited Is Not a Selling of Energy for Resale. The Language Is Not Exactly the Same But the Plain Effect Is Identical.

In Brief for the United States, p. 18, it is said:

> "The 'selling' expressly prohibited is not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

In other words, the Government argues that the section does not prohibit selling energy for resale but that

the prohibition against selling of the right to sell energy for which the Government now contends, is violated by a sale for resale. This is a proposition the very opposite of which was maintained by the Government throughout the course of the litigation from the commencement of the action to the filing of the Petition for Certiorari. We submit, infra, p. 54, that in these circumstances the Government should not be permitted to make the argument.

QUESTIONS PRESENTED.

There were five questions presented to the Circuit Court of Appeals.

(a) Whether it is the purpose of Section 6 of the Raker Act to and whether it does prohibit sale for resale. Upon this point the Government and the Municipality were in agreement that the Act had the purpose and the effect mentioned. (See Op. C.C.A. R. 676-677; 106 F.2d 575, c. 2, line 26 to p. 576, c. 1, line 10.) See Government's position quoted supra, pp. 5, 6.

(b) Whether Section 6 prohibits a contract of agency. The Government contended that it does and the Municipality contended that it does not. (See Op. C.C.A. R. 674, 106 F.2d 575, c. 1, lines 12-32; also R. 676-677, 106 F.2d 575, c. 2, line 49 to 576, c. 1, line 2.) (It will be recalled that this contention of the Government originated in the District Court with the filing of its Reply Brief, February 26, 1938, four months after the final hearing, and that the proposition had never been before advanced in the case and, indeed, had never been advanced by anyone.)

(c) Whether the contract of July 1, 1925 is a contract of sale for resale or a contract of agency. The Government contended that it is a contract of sale for resale, and the Municipality contended that it is a contract of agency. (See Op. C.C.A. R. 674, 106 F.2d 575, c. 1, lines 12-18. See, also, footnote 4, supra, p. 2.)

(d) Whether the other defenses set up by the Municipality, called in the opinion of the District Court, "secondary defenses" and overruled en bloc, are valid *in toto* or in part.[12] The Circuit Court of Appeals did not deal with these so-called "secondary defenses", saying that in view of its decision on the points with which it dealt it was not necessary to consider the other contentions of the Municipality. (R. 666, 106 F.2d 572.)

(e) Whether the District Court erred in its rulings on the admission and rejection of evidence and the striking out of evidence already received. All of these rulings were in favor of the Government and against the Municipality and were assigned as error on appeal to the Circuit Court of Appeals and were there properly for consideration. They were not considered, however, for the reasons given in respect of "secondary defenses" i.e. the Circuit Court of Appeals held that its decision on the points with which

[12]The opinion of the District Court classified the positions taken in that Court by the Municipality as (a) a primary defense (R. 93:12; 23 F. Supp. p. 43, c. 1, line 28), meaning thereby the defense that the contract of July 1, 1925 was one of agency and not one of sale for resale; and (b) secondary defenses. (R. 93:24; 23 F. Supp. p. 43, c. 1, line 43.) The overruling of these secondary defenses was assigned as error on appeal to the Circuit Court of Appeals and the ruling was properly there for consideration. Inasmuch, however, as it reversed the District Court in respect of the primary defense, consideration of the secondary defenses became unnecessary as noted in the opinion. (Op. C.C.A. footnote 4 thereof. R. 666; 106 F.2d 572.)

it dealt made it unnecessary to consider the other contentions of the Municipality. We here treat these rulings as a single question for purposes of convenience.

These same five questions are here for decision (1) unless it be held, which we submit it should be, that the Government is precluded from here contending that it is not the purpose of Section 6 to and that it does not prohibit sale for resale, contrary to the position consistently maintained by it below; or (2) unless it be held, which we submit it should be, that the Government is precluded from arguing that the contract of July 1, 1925 is not one of agency because in its Petition for a Writ of Certiorari, it did not seek a review of the ruling of the Circuit Court of Appeals upon this point, notwithstanding that it did say that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1, 1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act" (Petition, p. 8, lines 3-6). In that connection, however, it is to be noted that in its Petition the Government said that this specification "is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote); and also that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City". (Petition, p. 2, footnote 1.)

If the Government is precluded from making argument on these two named matters, there will remain for decision here the question whether Section 6 forbids a contract of agency, and if it be decided that it does not, the case is at an end. On the other hand, if it be held that the statute does forbid a contract of agency or that the contract is one of sale for resale, the questions will remain (a) whether the so-called "secondary defenses" hereinafter considered are valid and defeat the action and (b) whether the rulings of the District Court in the admission and exclusion of evidence and in striking out evidence already received were improper and call for a reversal of the decree of the District Court in any event.

STATEMENT.

(1) The Action: Commencement and Nature Thereof.

April 27, 1937 (R. 36) the United States filed in the District Court its "Complaint for Injunction, Accounting and Compensatory Relief" (R. 2) against the City and County of San Francisco, to which a copy of the Raker Act approved December 19, 1913 (38 St. 242) was attached as an exhibit. (R. 12.)

The Raker Act granted to the Municipality lands and interests in lands in Yosemite National Park and Stanislaus National Forest and other public lands for the storage and conveyance of water for domestic purposes and uses and for the generation, sale and distribution of electric energy which are shown upon the Map introduced as the Municipality's Exhibit A (R. 222), supplemented by testimony relative thereto. (R. 305.) (See Map at end of this Brief.)

San Francisco had been active in seeking to obtain a mountain supply of water for a number of years, and to that end had acquired parcels of patented land within the Yosemite National Park and Stanislaus National Forest. (infra, pp. 43, 40-41; also see Map.)

Some of these lands were utilized in the project and those which were not used were conveyed to the Government pursuant to the Act. (infra, p. 40; also see Map.)

Other obligations were imposed by the Act upon the Municipality. Some of these were made necessary by the enjoyment of the grant and appropriately imposed as incident thereto; while others were clearly elements in the price paid by the Municipality for the grant including the annual statutory rental payable to the Government, which within the period December 19, 1913-December 19, 1938, totalled $350,000, and since the latter date continues at $30,000 annually in perpetuity (Raker Act, Sec. 7, R. 21:17-27). The provisions which impose obligations in the nature of elements in the price paid appear in the Appendix to this brief, pp. xxi to xxiii. (See also infra, pp. 38-40.)

At the final hearing in the District Court, Joseph James Phillips, Director of Property for the Municipality (R. 311) and R. B. Hansen, one of its civil engineers (R. 305) gave testimony (R. 558-564) that the value of the lands obtained by the Municipality from the Government was $244,139.45 (R. 559) and that the moneys paid to the Government and for work performed by the Municipality by the requirement of the Government totalled $2,702,607 including $1,250,000 paid by the Municipality to the United States in annual installments of $250,000 for the years 1932 to 1936 in lieu of the building of trails and the con-

struction of a road (R. 561), and also including $330,000, the annual statutory rental to December 19, 1937. (R. 561, 564.) After having been received subject to a motion to strike, the testimony was stricken out. (R. 557-564.) The ruling thus excluding the testimony was properly assigned for error and is here for consideration as will later appear.

The action was "instituted on behalf of the United States of America on direction of the Attorney General . . . pursuant to said written request [of the Secretary of the Interior] and under authority of the provisions of said Section 9(u) of said Act".[13] (Complaint R. 7, Par. XII.)

The complaint alleged that the defendant was then and had been "enjoying, using and occupying the rights, easements and lands granted by said Act for the purpose of generating and transmitting electric power for sale" (R. 6, Par. VII), and had been and then was "selling the electric power generated and transmitted as aforesaid to the Pacific Gas and Electric Company, a private corporation for and with the purpose and intent that the said cor-

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[13]The pertinent provision of Section 9, subsection (u) reads: "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all of the conditions hereinbefore and hereinafter enumerated:

. . . .

(u) . . . That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act."

poration resell the same to its customer consumers, including the people of said defendant". (R. 6, Par. VIII.)

The complaint also alleged (R. 10, Par. XIX) that "defendant should render to plaintiff a full, true and accurate accounting of all said sales by them made of electric power to said Pacific Gas and Electric Company, and should pay over to plaintiff the profits thereof. The proceeds of any such sales made during the pendency of this litigation should by order of your Honorable Court be impounded or by said defendant paid into court".

The prayer was for injunction to forbid sale for resale, or failing that, to forbid defendant "from use and enjoyment of the rights now used and enjoyed by them [the defendant City, its officers, agents, servants and employees] under color of said Act for the purpose of development and transmission of electric power".

The fifth defense in the Answer (R. 69) was for a declaration

> "(a) that the plaintiff has not and has not had since they were first appropriated by the defendant, any proprietary right, title or interest in or to any of the waters referred to in the complaint or in this action, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or through said waters; (b) that the plaintiff has no proprietary right, title or interest in or to the electric energy generated by the defendant by or through the use of the water aforesaid, and has no right, title or interest in or claim upon or in respect of the moneys realized by the defendant from or

through said electric energy generated by the defendant; (c) that under the Raker Act the plaintiff has no right of forfeiture in respect of any of the water appropriated and diverted by the defendant or energy generated by it, and no right of accounting in respect thereto, but that it is limited for remedies of any breach of obligation imposed upon the defendant by Congress and accepted by it, as provided in the Raker Act, particularly Section 9, subsection (u)."

In connection with this plea for declaratory relief, the Answer quoted Section 9, subsection (u), as in footnote 13, supra, and added Congressional debates respecting the provision whereby it was shown beyond all doubt (so we submit) that Section 9, subsection (u) controlled and that it was impossible in the face thereof to state a cause of action for forfeiture.[14] (R. 71 ft.-75 ft.)

At the opening of the final hearing, in the District Court October 19, 1937, counsel for the Government said (R. 189-190):

"I have been authorized to state to the Court that the Government is not seeking in this case and will not offer any evidence upon the subject of damages; neither will we seek an accounting of the City and

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[14]The only forfeitures in the Raker Act are in Section 5, which provides that a failure diligently to prosecute the work of construction contemplated in the Act etc. should entail forfeiture, and by the proviso in Section 6 forbidding a sale of the rights granted, and providing "this grant shall revert to the Government of the United States" in the event of a sale of the rights granted.

Inasmuch as the work of construction contemplated in the Act was long since fully completed, the provisions of Section 5 may be said to be functus officio.

County of San Francisco of any profits that the City and County may have made through the diversion of the electric energy generated on the Hetch Hetchy project.

The issue is a simple one. The question is has the City and County of San Francisco violated the provisions of Section 6 of the Raker Act. . . .

We are not seeking a forfeiture of the grant contained in the Raker Act. We are simply seeking an injunction restraining the violation by the City and County of San Francisco of Covenant 6 contained in the Raker Act."

Thenceforward the Government prosecuted the action as one to restrain the violation of a restrictive covenant. (*Oregon & Cal. RR. Co. v. United States*, 238 U.S. 393, reading from p. 419, line 34, "It appears, therefore" to p. 423, line 10.)

Restrictive covenants are usually if not always created in respect of property granted, but here the property involved, i.e., electric energy, was not granted by the United States to the Municipality but is generated by it—3% thereof (R. 291) at the Early Intake power house located on land within Stanislaus National Forest granted by the United States to the Municipality, and 97% thereof at the Moccasin power plant which is built on land not granted by the United States to the Municipality but acquired by the latter from private proprietors.

Neither the water nor the electric energy belonged to the United States and no interest in it was granted by the Government to the Municipality by the Raker Act. The

Raker Act merely gave rights and privileges in the public domain which enabled the Municipality to utilize the water rights owned by it and thereby to generate electricity.

The Government's position is that without "the lands, rights and privileges granted by the Raker Act" (R. 160:12) the Municipality could not have captured the water nor have generated the electric energy, and therefore the Municipality can be restrained "from continuing to utilize the lands, rights and privileges granted by the Raker Act for the purpose of the generation of electric energy" (R. 167:10) if it is violating the Raker Act.

Thus far in this Statement we have dealt with the action. We now deal with other matters necessary to a full understanding of the case.

(2) House Rept. No. 41, 63d Congress, 1st Session, 1913.

As stated, supra, page 11, Mr. Raker in the 63d Congress, 1st Session, introduced five Hetch Hetchy bills (H.R. 112, 4319, 6281, 6914 and 7207), all of which were referred to the Committee on the Public Lands. The last H.R. 7207 was introduced and referred on August 1, 1913. (50 Cong. Rec. 3023, c. 2 m.) Four days later, on August 5, 1913, Mr. Raker submitted the unanimous report of the Committee, recommending that the Bill do pass. (50 Cong. Rec. 3127, c. 2 ft.)

The Report, after an introductory paragraph, contains the text of H.R. 7207 in full (pp. 1-8) followed by "Analysis of H.R. 7207" (pp. 9-16), in which the substance of each provision is given in turn followed gen-

erally with interpolated comment. The Analysis is followed by matter of a miscellaneous character. (pp. 16-43.)

In the course of its passage, H.R. 7207 was amended. The "Analysis" is addressed to the provisions in the Bill as introduced and not as finally passed; indeed it is more accurate to say that the "Analysis" seems to have been drafted to accompany either H.R. 6281 or H.R. 6914 above mentioned, for in instances it does not deal with text introduced for the first time in H.R. 7207.

The "Analysis" was twice printed at length in the House proceedings of August 29, 1913. (50 Cong. Rec. 3909, c. 1 ft.; 3921, c. 2 m.) After H.R. 7207 had been passed in the House it went to the Senate and was referred to the Senate Committee on the Public Lands which in a one page Report (Senate Report, 63rd Congress, 1st S. No. 113, dated September 25, 1913) recommended that the bill do pass and said: "Reference is hereby made to House Report 41, first session Sixty-third Congress, which is a very full and complete statement with reference to the purpose and intention of this bill". House Report No. 41 was printed in full in the Senate proceedings of October 4, 1913 (50 Cong. Rec. 5450-5462) and is cited in Brief for the United States, p. 10, to a point with which we shall deal later. In the meantime, we draw upon the House Report for matters pertinent to this Statement.

(a) The Report shows that water and water rights involved in the Hetch Hetchy project were acquired by the Municipality from the State of California and not from the United States.

The "Analysis" says (p. 16):

"CITY OWNS WATER RIGHTS.

The city and county of San Francisco, under the laws of the State of California, has taken and performed all necessary acts to acquire, appropriate, and use the waters of the Tuolumne River, which has been done in strict compliance with the laws regulating the appropriation and use of waters in the State of California, and now has and holds a valid water right by virtue of its acts performed under the laws of said State."

The "Analysis" also says that "the bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water" (p. 9); and Section 11 of the law itself declares that it shall not be construed etc. "to affect or in any way to interfere with the laws of the State of California" etc. (R. 16.)

See Appendix, pp. xxvii to xxix, for proceedings in Congress showing that the Raker Act was not designed to grant water rights and that the necessary rights were already possessed by the Municipality.

See, also *Meridian Ltd. v. San Francisco*, 13 Cal. (2d) 424, 432, 433 (1939).

(b) Some of the considerations paid by the Municipality to the United States are set forth in the Report.

"Proviso 2 of section 4 requires the grantee to construct and maintain bridges and crossings" etc. . . .

"(The requirements of this section cause the grantee to expend a considerable sum in the improvement of the park and the forest reserve and make access to these public places easy and comfortable. The expenditure of this money for this purpose is a consideration, in part, for the grant.)" (Anal., p. 10.)

"Section 7 provides that for and in consideration of the grant the grantee shall make certain payments. . . . The theory of this section is that San Francisco is receiving certain privileges and benefits from the national park, and that the consideration is for the use of public lands now owned by the United States. The payments proposed will, it is estimated, amount to more money annually than is at present charged to private corporations under similar Federal conditions." (Anal., p. 11.)

"Paragraph (c), section 9, is a condition [etc.] . . . .

The benefit to the irrigation districts in this provision is that the landowners will receive the benefit of an investment of approximately $50,000,000 without being compelled to put up any part of the cost." (Anal., p. 13.)

"Paragraph (k), section 9, requires San Francisco to build a dam at least 200 feet high.

(This means that the city will expend from $500,000 to $1,000,000 in excess of initial expenditures necessary for its immediate needs. The intent is to build the dam high enough to provide adequate storage to meet the conditions of the grant, and is primarily a benefit for the irrigationists.)" (Anal., p. 14.)

"Paragraph (p), section 9, provides for the building of roads and trails in the Yosemite National Park as designated by the Secretary of the Interior.

. . . These roads will cost the city of San Francisco $500,000 to $1,000,000, and are to be turned over, free of charge, to the United States. This is one of the important considerations, and carries compensation to the Government for the rights of way granted." (Anal., p. 15.)

"Paragraph (t) [Section 9] requires the grantee to convey to the United States any and all tracts of land now owned by the city within Yosemite National Park or the national forest, which lands are not actually required for use under the provisions of this act.

(The City of San Francisco purchased private lands for the purpose of exchanging the same with the Government in lieu of that portion of the floor of the Hetch Hetchy Valley, which is not owned by the city. The purpose of this plan is to provide suitable and desirable camping places for visitors . . . and at the same time compensate the United States for lands to be submerged.)" (Anal., p. 15.) (See Map infra.)

Following the Analysis the matter below appears (p. 18):

"City Owns Hetch Hetchy Valley.

The city owns two-thirds of the floor of the Hetch Hetchy Valley, and also owns a portion of the dam site.

The city has spent $1,750,000 in the purchase of privately-owned rights in the Hetch Hetchy Valley and the Yosemite Park, and now asks Congress for permission to build a dam and for rights of way for conduits, pole lines, etc., over the public lands.

In creating this water system, the city agrees to supply water at cost to irrigationists, and will also

supply electric energy at cost to landowners in the Turlock-Modesto district.

The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to develop this energy in 10,000 horsepower units, and use the power for public purposes in San Francisco and adjoining cities.

The following data, from the report of the Army engineers and from the testimony of the engineers before the Public Lands Committee, give the acreage of the proposed reservoirs: . . .

	Acres in reservoir site.
Hetch Hetchy	1,330
Lake Eleanor	1,443
Cherry Valley	960
Lands [acres] owned by San Francisco in Yosemite National Park	1,960.33
Lands [acres] owned by San Francisco in forest reserve	1,446.13
[Total]	3,406.46

Total area which will be flooded in three reservoirs, 3,373 acres. . . .

The ultimate cost of the project is estimated at $77,000,000. The initial cost for the first installation necessary to bring 200,000,000 gallons of water to the city is $37,500,000."

(c) The Report proceeds upon the assumption that the Government is acting as grantor in a statutory conveyance.

"The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee." (Anal., p. 9.)

This same idea is expressed in Govt. Supp. Br. C.C.A. page 19, lines 23-27, where it is said:

> "The Government has never contended that the provision under consideration here is stricti juris a condition; it is a restrictive provision inserted by the Government as grantor in a statutory conveyance."

(See Appendix, pp. xxix-xxxii, for proceedings in Congress showing that in the Raker Act the Government was acting as a proprietor and not as a sovereign.)

(d) Section 6, to which the comment in the Analysis is directed, is not in the form in which the section was enacted; and the comment is addressed to both provisions in Section 6 and not to the first one alone, which is the one with which we are dealing throughout this brief.

Section 6 of H.R. 7207 read as follows (H. Rept. 41, p. 4):

> "Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

In the Analysis (p. 11) it is said:

> "Section 6 provides that the grantee is prohibited from selling or letting to any corporation or individual, except a municipality, a water district, or an irrigation district, the right to sell or sublet the water or electric energy sold or given to it by the grantee; it is provided also that the rights under the grant shall not be subject to sale, assignment, or transfer to any private person, corporation, or association.

(This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco.)"

(e) The Report (p. 17) shows that at the time differences between parties in interest had been adjusted.

"For 12 years San Francisco has been endeavoring to procure a water supply from the Hetch Hetchy Valley.

The city's object was opposed until this year by the Spring Valley Water Co., the irrigationists of the Turlock-Modesto irrigation district, the promoters of several water schemes which the city did not want, and by a small group of men who based their objections upon love of nature and opposed the creation of a lake where a canyon now exists.

All this opposition, except that of the nature lovers, is withdrawn.

The city has arranged for an amicable condemnation proceeding to acquire the property of the Spring Valley Water Co.

The city has agreed to protect the prior rights of the irrigationists and will spend from $500,000 to $1,000,000 more than is required at this time to increase storage to guarantee water for irrigation."

(f) In the Report (H. Rept. No. 41) a minor position is given to electric energy, etc.

H.R. 7207 contained substantially all of the provisions respecting electricity or electric power or electric energy which are found in the Raker Act as enacted. In addition to those references and to like references in the Analysis, there are references in other parts of the Report to electric energy but they are casual and unimportant.

We have carefully read the whole of the Report and have assembled the references mentioned as follows, giving pages and lines: "incidental hydroelectric power plant" 9:12-13; "to prevent cold storage of power possibilities" 14:54; "will also supply electric energy at cost" 18:9; "The power potentiality of the stream is estimated at 115,000 horsepower . . . It is proposed to develop this energy . . . and use the power for public purposes in San Francisco and adjoining cities." 18:11-14; "no credit for power development" 19:24; "additional power possibilities" 20:14; "the opportunity for economical water power development" 22:23-24; "a greater amount of water-power than any other" 23:22; "California . . . needs this water . . . for power" 25:5-7; "waters might be used for irrigation purposes and for power purposes" 25:12; "for the development of power now going to waste" 25:62-63; "will also receive municipal power at a lower price" 27:33-34; "irrigation use . . . connected with the municipal and power use" 27:54-55; "the power development in the Hetch Hetchy" 29:39; "available water will be eventually used for irrigation or power" 33:51-52; "rights for power and irrigation were obtained" 34:49-50; "power transmission lines" 37:20; "necessary power-house sites and diverting or storage dam sites" 37:21; "San Francisco proposes . . . to furnish electric power at cost to the Modesto and Turlock irrigation districts and to municipalities situated therein" 37:42-53; "has agreed to furnish both districts with hydroelectric power at absolute cost" 38:59-60; "that the city be required to furnish them with hydroelectric power at cost" 39:4; "the maximum power that can be derived under this project" 39:10-11; "a much smaller power yield" 39:30; "the total power development of the

Hetch Hetchy project is 115,000 horsepower" 39:30-31; "the impracticability of developing any hydroelectric power from this source" 39:45; "the impossibility of generating any power through its use" 39:58-59; "a dam for water power purposes" 41:33; "light and power and electric current free of cost" 41:36-37; and "the largest possible amount of hydroelectric power is to be developed and distributed to the parties directly interested" 42:52-54.

(3) Defendant's Exhibit A (Map) (a reduced portion whereof is attached at the end of this brief) introduced at R. 222, gives the location of the various works which constitute the Mountain Division of the City's Hetch Hetchy project and shows which of them are located on lands granted by the Raker Act and which of them were acquired by the Municipality by purchase from private owners.

There are two power plants, one the Early Intake, which furnishes 3% of the total municipal power, and the other the Moccasin, which furnishes the other 97%; the locations of both plants are shown upon the Map.

The waters utilized at Early Intake come from (a) Lake Eleanor Reservoir (in the Park); (b) Eleanor Creek (in Park and Forest), and (c) Cherry Creek (in Forest); and flow into Cherry River, thence to Lower Cherry Diversion Dam near Early Intake where they are diverted by Lower Cherry Aqueduct into Early Intake Power House.

The waters utilized at Moccasin come (except a minor contribution) from Hetch Hetchy Reservoir (in the Park, partly on public and partly on privately owned lands) and flow (partly in Park and partly in Forest) in the Tuolumne River (partly through public and partly through privately owned land) 12.5 miles to a point (in the Forest) where they are diverted from the River by aqueduct 18.8

miles to Priest Regulating Reservoir (partly on public and partly on private land, in neither Park nor Forest); thence two miles (for greater part over private land, but a short distance over public land) to Moccasin Power House (on municipally owned land).

The works which are used in connection with the Hetch Hetchy Project are the following:

(a) (1) Hetch Hetchy (O'Shaughnessy) Dam and Reservoir, and (2) Lake Eleanor Dam and Reservoir in the Park.

(b) (1) Lower Cherry Diversion Dam on Cherry River; (2) Lower Cherry Aqueduct from above dam to Early Intake with extension to Early Intake Dam; (3) Early Intake Diversion Dam and Power Plant; (4) Aqueduct (wholly on private lands) from Early Intake Plant to Priest Regulating Reservoir in the Forest (14 miles of the Aqueduct is in the Forest and about 2 miles on public land and about 2.8 miles on private land outside the Forest); and (5) an overhead transmission line from Early Intake to Moccasin Power House (partly inside and partly outside the Forest);

(c) An overhead transmission line from Early Intake to Hetch Hetchy Dam (partly in Park and partly in Forest);

(d) (1) Priest Regulating Reservoir (partly on Government and partly on private land, all west of Forest); and (2) Aqueduct (2 miles) from Priest Regulating Reservoir to Moccasin Power Plant on Public Lands west of Forest. (A small part is on private land.)

(e) Moccasin Power Plant and transmission line across San Joaquin Valley and Coast Range Mountains to Newark (on municipally owned land).

(4) The Opinion of the Circuit Court of Appeals contains a statement of the facts without which any other would be incomplete.

We here refer to that portion of the Opinion of the Circuit Court of Appeals commencing with the words "Before dealing with the contentions of the parties" (R. 661 ft.) down to and including "In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof". (R. 666, lines 2-5.) The same matter appears commencing at 106 F.2d 571, c. 1, line 13, and concludes with the last line of column 1, page 572.

SUMMARY OF ARGUMENT.

1. The Government having uninterruptedly maintained the position in the courts below that the case is controlled by Section 6 of the Raker Act and that the purpose thereof is to prohibit, and that it does in fact prohibit, sale for resale should not now be permitted in this Court to argue to contrary effect.

In dealing with Section 6, it is to be noted that the Raker Act is implicit with the idea that the Municipality is to sell or otherwise dispose of water and electric energy; and by explicit command of the Act, the Municipality is required to do so. In Section 6 it is presupposed that this will be done, and that presupposition is the base

of the section, which in consequence involves an ellipsis and a reading of Section 6 as shown supra page 4. As thus read the section imposes only a restriction on sale for resale purposes, and this is shown to be the true reading of the section by its genesis found in (a) the Dictation by President Theodore Roosevelt for inclusion in The Owens River Grant to Los Angeles, (b) The Owens River Grant itself (34 Stat. 801), (c) the contrast of Section 6 of The Owens River Grant with President Theodore Roosevelt's Dictation, (d) the contrast of Section 6 of the Raker Act with Section 6 of The Owens River Grant, and (e) the several Hetch Hetchy bills introduced by Representative Raker in the 63rd Congress, first session (1913).

Throughout the course of this action in the District Court, the Government maintained an interpretation of Section 6 in full harmony with the reading which we give the section after supplying the omitted words as upon an ellipsis. The Government's interpretation, in harmony with that of the Municipality, is found in the complaint, the Government's opening statement at the final hearing, the Government's position through the final hearing, the brief for the Government filed in the District Court on November 1, 1937, and the reply brief for the Government filed on February 26, 1938.

The District Court concurred in the interpretation which the Government put upon Section 6, i. e., that it was the purpose thereof and that it did prohibit sale for resale; and while it made mention of the belated argument of February 26, 1938 that the same section forbade a contract of agency, it made no comment upon the soundness thereof. The issue decided by the District Court

was whether the contract was one of sale for resale or one of agency.

In the two briefs filed by the Government in the Circuit Court of Appeals the Government maintained the same position, and the opinion of the Circuit Court of Appeals states the claims of the Government in line with the foregoing and its conclusions in respect thereto.

In its Petition for Certiorari, page 8 foot, the Government argued that "the 'selling' prohibited [by Section 6] is not the selling of energy for resale", a proposition which was never before advanced in the case and which is in diametrical opposition to the positions taken by the Government throughout the litigation and in both of the courts below.

In Brief for the United States filed March 8, 1940, the Government renews its argument thus made for the first time in the Petition for Certiorari and claims that the selling prohibited is not a selling of energy for resale except "by necessary implication". (p. 18 and ftn. 9.) The language of the Brief is not exactly the same as that of the Petition but the plain effect is identical.

The authorities which support the foregoing propositions will be found infra, pp. 54-56.

2. The Government not having applied for certiorari to review the holding of the Circuit Court of Appeals that the contract of July 1, 1925, is one of agency and not one of sale for resale, should not be permitted here to challenge that ruling.

For authorities upon this point, see infra, pp. 56-58.

3. If it should be held that the Government may now claim (a) that there are other sections of the Raker Act which control the case in whole or in part; (b) that it is not the purpose of Section 6 to and that it does not prohibit sale for resale; and (c) that the contract of July 1, 1925 is one of sale for resale, the considerations which follow show (so we submit) that there is not any validity in any of the propositions thus stated.

4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof.

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action.

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas.

There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F.2d 575, c. 1, lines 19-29; R. 676-677; 106 F2d 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent". (Govt. Supp.. Br. C.C.A. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20.

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U.S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of

the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency.

10. The contract of July 1, 1925 is one of agency and not one of sale for resale.

11. The seven points, 1 to 7, inclusive, upon which the Government rests its argument that the contract of July 1, 1925 is one of sale and, therefore, unlawful will be found, upon analysis, to be wanting in merit and to afford no justification for even the unsound method of interpretation put forward in the brief.

12. The so-called findings of fact respecting the interpretation and meaning of the contract are not to be regarded as findings at all, considering (a) that questions respecting the construction of a contract are questions of law and not of fact, and (b) that the contract is plain and unambiguous and (as the Government conceded below) has been fully performed in all particulars, except one which arose ten years after the execution of the contract, and in respect of which the Government contends that the Company should in the years 1935, 1936 and 1937 have accounted to the Municipality for smaller sums than it actually accounted for in those years. Furthermore, there was no evidence extrinsic to the contract which in any manner varied the terms thereof, and hence any finding

in conflict with the plain terms and legal effect of the contract is unsupported by the evidence and should be rejected, quite apart from the fact that the case being one in equity, the findings are at large in this Court.

13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful.

14. There is no warrant for the suggestion that the contract of July 1, 1925 is opposed to the legislative policy of Congress, or that the congressional policy which underlies Section 6 is any broader than that expressed therein.

15. There is no merit in any other argument made in the Brief for the United States to establish the contention that the contract of July 1, 1925 is not a contract of agency, or (as expressed by the Government) that it is a contract constituting a grant, upon a consideration, of the right to sell.

16. Even if the contract of July 1, 1925 were in violation of Section 6 of the Raker Act, the Government would not be entitled to the relief which it here seeks.

17. The District Court erred in sundry instances in rejecting evidence offered by the Municipality.

ARGUMENT.

1. The Government having uninterruptedly maintained the position in the Courts below that the case is controlled by Section 6 of the Raker Act and the purpose thereof is to prohibit, and that it does in fact prohibit, sale for resale should not now be permitted in this Court to argue to contrary effect.

We submit that we have shown, in subdivisions (g), (h), (i) and (j), supra, pp. 12 to 25, that from the filing of the Complaint in this action April 27, 1937, to the filing of its last brief (after oral argument) in the Circuit Court of Appeals, July 10, 1939, the Government uninterruptedly maintained in the courts below that the case was controlled by Section 6 of the Raker Act and that the purpose thereof was to prohibit, and that it did in fact prohibit sale for resale.

We also submit that we have shown in subdivisions (k) and (l), supra, pp. 25 to 27, that in its Petition for Certiorari and in Brief for the United States the Government maintains a position in diametrical opposition to the position which it so maintained in the courts below.

Finally, we submit that the Government should not be heard to make arguments in support of this new position.

The case comes within an important and universally accepted rule of appellate procedure, which has been applied in this Court, in certiorari.

"This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it" (*Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380).

"Generally, at least, suitors may not maintain a position here which conflicts with that taken below" (*Seney v. Swift & Co.*, 260 U.S. 146, 149). "The point does not appear to have been raised either in the District Court or in the Court of Appeals. . . . We are not disposed to deal with a question of that importance presented in this manner" (*Kay v. United States*, 303 U.S. 1, 5). "[The new argument] is an afterthought and urged in this court for the first time" (*Virtue v. Creamery Package Co.*, 227 U.S. 8, 39).

In the following cases this rule was applied against the Government. *United States v. La Franca*, 282 U.S. 568, 576 ft.; *Kay v. United States*, 303 U.S. 1, 4 ft.; *United States v. Peterson* (CCA 10) 34 F.2d 245, 250, c. 1 top.

The rule just invoked is akin to the rule on "Invited Error".

"The District Court . . . granted the Government's motion . . . Of this error the Government cannot complain" (*Law v. United States*, 266 U.S. 494, 496). "The defendant . . . cannot complain of a course to which it assented below" (*Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U.S. 353, 356). "The defendant procured or acquiesced in the rulings . . . and thereby waived the right to object to them" (*New York Elevated Railroad Co. v. Fifth National Bank*, 135 U.S. 432, 441).

This rule was applied against the Government in *United States v. Kettenbach* (CCA 9), 208 Fed. 209.

A reference to innumerable cases, federal and state, which support these propositions will be found in the Encyclopedias and Textbooks assembled in the margin.[15]

The point with which we are now dealing is ignored in Brief for the United States although it was made in Add. Br. Opp. Cert. pp. 16, 67, and although note is taken of the latter brief in the former. (p. 17, fn. 8.)

2. The Government not having applied for certiorari to review the holding of the Circuit Court of Appeals that the contract of July 1, 1925, is one of agency and not one of sale for resale should not be permitted here to challenge that ruling.

In Add. Br. Opp. Cert. p. 14, we pointed out that in its Petition the Government did not seek certiorari to review its specification of error that the Circuit Court of Appeals erred "in failing to hold that the contract of July 1,

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[15]The following deal with the rule that an appellant (or petitioner in certiorari) will not be permitted to advance arguments on appeal not made below.

3 *C. J.*, *Appeal and Error*, Sec. 618, p. 718, and Supplements;
4 *C. J. S.*, *Appeal and Error*, Sec. 241, p. 465;
3 *Am. Jur.*, *Appeal and Error*, Sec. 253, p. 35;
6 *Cyc. of Fed. Proc.*, Sec. 2974, p. 585;
Simkins, Federal Practice, 3rd Ed., Sec. 1002, p. 720;
8 *Hughes Federal Practice, Jurisdiction and Procedure*, Sec. 5613, p. 147;
Elliott, Appellate Procedure, Secs. 489 et seq., pp. 410 et seq.

The following deal with the rule on Invited Error:

4 *C. J.*, *Appeal and Error*, Sec. 2606, p. 700 and Supplements;
5 *C. J. S.*, *Appeal and Error*, Sec. 1501, p. 173;
8 *Hughes, Federal Practice, Jurisdiction and Procedure*, Sec. 5613, p. 144;
Marker, Fed. App., Jurisdiction and Procedure, Sec. 218, p. 267;
Elliott, Appellate Procedure, Sec. 623 et seq., pp. 543 et seq.

1925 between the City and the Company is a contract to sell energy for resale, prohibited by Section 6 of the Raker Act". (Petition, p. 8, lines 3-6.) The Petition said that the specification "is not urged as a reason for granting the writ of certiorari, but is reserved for argument on the merits" (Petition, p. 8, footnote 6), and that "if certiorari is granted, the Government will also contend that the agreement provides for sale of the energy to the company for resale, rather than for its sale by the company as agent for the City". (Petition, p. 2 footnote 1.)

We call attention to the following decisions.

"Our consideration of the case will be limited to the questions specifically brought forward by the petition". (*General Pictures Co. v. Elecric Co.*, 304 U.S. 175, 177.) "The review granted was not intended to be broader than that sought in the petitions". (*Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 494.) "It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner". (*Helis v. Ward*, ___ U.S. ___, 60 S. Ct. 283, 285 c, 1 Adv. Ops. October Term 1939, 240, 242, decided December 18, 1939.)

See also *Helvering v. Wood*, ___U.S.___, decided February 26, 1940, and *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508.

As the Government did not ask Certiorari in respect of the interpretation put upon the agreement of July 1, 1925 by the Circuit Court of Appeals, we submit that the mere statement of that question in the Petition as one which the Government would later bring forward does not de-

stroy the applicability of the rule stated in the cases mentioned.

Although this point was taken in Add. Br. Opp. Cert. pp. 14-15, and *Helis v. Ward*, supra, cited in support thereof, p. 76, the point is ignored in Brief for the United States.

3. If it should be held that the Government may now claim (a) that there are other sections of the Raker Act which control the case in whole or in part; (b) that it is not the purpose of Section 6 to and that it does not prohibit sale for resale; and (c) that the contract of July 1, 1925, is one of sale for resale, the considerations which follow show (so we submit) that there is not any validity in any of the propositions thus stated.

We propose now to show (a) that the purpose of Section 6 of the Raker Act was to prohibit and that it does prohibit sale for resale (and nothing more); (b) that Section 6 does not prohibit agency; and (c) that the contract of July 1, 1925 is a contract of agency and not one of sale for resale.

4. Although the language of Section 6 clearly prohibits sale for resale and nothing more and hence does not require aid in its interpretation from proceedings in Congress, or in the Department of the Interior, or from the positions taken in the course of this action by the Department of Justice, nevertheless, these are brought to the attention of the Court to make it known that all of the named Departments of the Government have interpreted Section 6 as one forbidding sale for resale, without more, in order that it may be shown how steadfastly the original and true interpretation has been adhered to, as affording conclusive proof of the soundness thereof.

From the beginning the Government has steadfastly argued that Section 6 was a clear and unequivocal pro-

hibition against sale for resale. In its first brief filed in the District Court November 1, 1937, it said: "It is submitted that the language of Section 6 is . . . a clear and unequivocal prohibition against sale of such energy to a private party for the purpose of resale. In such circumstances recourse to the legislative history of the Raker Act to determine the intent of Congress is neither necessary nor justified." (p. 58.) (Quoted supra p. 5.)

We agree with the position of the Government thus stated in its first brief and we quote, infra, pp. 92 to 94, from decisions of this and other Courts to the effect that "as this Court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive". (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937).)

The absence of necessity or justification for resort to legislative history is equally applicable in respect of proceedings in the Department of the Interior. Indeed, the Brief for the United States, p. 17, fn. 8, says that "the statute is unambiguous". We agree that there is nothing ambiguous in the prohibitions of Section 6 and therefore resort to the interpretation thereof in Departments of the Government is neither necessary nor justified. The Government so conceded below, supra, p. 5.) Although we differ with the Government as to the meaning of the Section because we adhere to the view expressed by the Government November 1, 1937, supra, p. 5, whereas the Government has changed its position altogether and now says in effect that it is a clear and unequivocal prohibition

of something different. Resort to aid of interpretation from the Department of the Interior is, in our opinion, neither necessary nor justified; but if there were necessity or justification for such resort, the interpretation of the statute by the Department through the years would be followed. *United States v. Minnesota,* 270 U.S. 181, 205 foot (1926): "Even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction"; *Wisconsin v. Illinois,* 278 U.S. 367, 413 foot (1929): "Nothing is more convincing in interpretation of a doubtful or ambiguous statute"; *McLaren v. Fleischer,* 256 U.S. 477, 481 (1921): "If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons"; *Brewster v. Gage,* 280 U.S. 327, 336 foot (1930): "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons"; *Fawcus Machine Co. v. United States,* 282 U.S. 375, 378 foot (1931): "They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons."

Bearing these views in mind, we proceed to consider the interpretation which has consistently been put upon Section 6 by the different departments of the Government and to show that for twenty-four years (1913-1937) including the period during which the Raker Act was in course of enactment in Congress, there was unanimity in the interpretation of Section 6 as forbidding, in cases presenting the contentions here present, sale for resale and nothing more.

(a) The Raker Act originated in the House of Representatives and the chief discussion of the measure was had there. The only discussion of Section 6 as a specific provision of the Act was had in the House, no such discussion having taken place in the Senate. There was unanimity in the House that Section 6 was a prohibition of sale for resale (and nothing more).

Discussion of Section 6 in the House.

The purpose of Section 6 was dealt with in the House on August 29, 30 and September 2, 1913, by Representative Towner of Iowa, Representative Thomson of Illinois, a member, and Representative Ferris of Oklahoma, Chairman, of the House Committee on the Public Lands. They said:

"It is proposed in this bill that the city can not sell water or power to any corporation or individual to sell or sublet. But it is not provided that the city may not sell to any corporation it chooses all the water or electric energy it desires for its own use." (Representative Towner, August 29, 1913, 50 Cong. Rec. Appendix, p. 462, c. 2.)

"Under the provisions of section 6 the grantee . . . can not sell water or electric energy to any private corporation or individual for the purpose of resale."

(Representative Thomson, August 30, 1913, 50 Cong. Rec. 3980, c. 1, top.)

"Is it not correct that this section, as it reads now, provides substantially that the grantee under this act can not sell to any individual or corporation other than a municipality the right to take any of this water and this power and resell it to somebody else? . . . If this language is read carefully I think it will be seen that . . . these municipalities are prohibited from ever selling or letting to any corporation or individual except a municipality the right to take any of this water and this power and resell it." (Representative Thomson, August 30, 1913, 50 Cong. Rec. 3996, c. 2, top.)

"It says that the city can sell their water power to private individuals or corporations for consumption, but not for the purpose of resale." (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4094, c. 2, middle.)

"When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'. With those words in that section . . . San Francisco may sell this water or electric energy . . . . to any other municipality that may come in under the provisions of this bill, or to any private individual in the city for consumption, or to any corporation in the city for consumption, and only for consumption, and under this section it is absolutely impossible for San Francisco to sell a drop of water or a bit of electric energy to any private individual or to any corporation for the purpose of reselling it." (Representative Thomson, September 2, 1913, 50 Cong. Rec. 4096, c. 2, ft.-4097, c. 1, top.)

"[The] lessee . . . is by the terms of the bill confined to somebody who wants to use this for consumption. . . . What objection is [there] to the city of San Francisco selling electrical energy to somebody, either an individual or a corporation, solely for consumption and not for the purpose of reselling?" (Representative Thomson, September 2, 1913, 50 Cong. Rec. p. 4097, c. 1, ft.)

"San Francisco could not sell to any soap manufacturer or ice manufacturer anything that they could resell, but they could sell it to them for their own use." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 1, foot.)

"There is an express provision to the effect that they can not resell the power in any way. They can sell for use only with a positive restriction against sale for any resale purposes of any sort." (Representative Ferris, September 2, 1913, 50 Cong. Rec. p. 4093, c. 2, middle.)

It is manifest that these members of the House who spoke respecting the meaning of Section 6 read the section as it is written and had no difficulty in understanding that the provision was intended to prohibit sale for resale (and nothing more).

We now consider how the section was dealt with in the Department of the Interior.

(b) Whenever it had occasion to consider Section 6 in the period 1913-1937 the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale (and nothing more).

The record shows that Section 6 came under review or was mentioned or referred to in the Department of the Interior on five different occasions and that there were three formal opinions by Solicitors of the Department and one by the Secretary dealing with the subject.

The first was by Solicitor Edwards, June 8, 1923 (R. 342-354); the second by Acting Solicitor Wright, July 20, 1925 (R. 234, last line; 359-366); the third by Solicitor Margold October 27, 1933 (54 I. D. 316; R. 243, line 14); and the fourth by Secretary Ickes August 24, 1935 (R. 232-269).

In each of these, the opinion was expressed in one form or another that Section 6 forbids sale for resale, without more.

Solicitor Edwards' opinion did not deal with the contract of July 1, 1925 for it was rendered in 1923 two years before the contract was made.

Acting Solicitor Wright, whose opinion was written nineteen days after the execution of the contract of July 1, 1925, held "that the contract was one of agency or consignment and not one of sale in violation of the provisions of the statute" (R. 234:31-235:8).

Solicitor Margold dealt with the meaning of Section 6 abstractly, and not specifically in reference to the contract. He held (in 1933) that "San Francisco may sell electric power developed at the Hetch Hetchy site to a privately-owned electric utility company only if the mu-

nicipality first receives convincing assurance that all such power will be consumed by the company and will in no instance be resold or redistributed" (54 I. D. 316, 317).

He also said:

> "I wish particularly to emphasize the fact that this section prohibits . . . the transfer by the municipality . . . of any right to resell or sublet any electric energy *which it may sell to a private company.*"

Secretary Ickes held that Section 6 forbids a contract of sale for resale and that the contract of July 1, 1925 was such a contract of sale for resale and not one of agency and therefore was in violation of the Raker Act.

There is nothing to show when Acting Solicitor Wright's opinion was made public or came to the knowledge of the Municipality. So far as the Record shows it first became publicly known through reference thereto in Secretary Ickes' opinion of August 24, 1935 (U. S. Ex. 11, R. 230-269), where it is said (R. 234:31-235:8):

> "On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute."

Secretary Ickes' opinion was introduced in evidence by the Government. The Municipality offered the opinion of Acting Solicitor Wright. The Government objected. The opinion (for text thereof, see R. 359-366) was received in evidence subject to a motion to strike it out, and later, on motion of the Government, was stricken out. This was Assignment of Error No. 11 by the Municipality (R. 535), and is here for review.

Opinion of Solicitor Edwards: Circumstances Giving Rise Thereto.

The work of construction of the Hetch Hetchy project covered the period 1913-1925; in that period it became necessary for the Municipality to provide electric energy for construction work and by 1918 it had constructed (within the Stanislaus National Forest at a point shown on the Map at the end of this brief) and was operating in the High Sierras the Early Intake Power House, which is a relatively small one, presently furnishing only 3% (R. 291) of the entire electric energy generated by the Municipality.[16] The amount generated at Early Intake in 1918 exceeded construction requirements and there was a surplus either to waste or to be disposed of. This was during the World War. The Federal Power Administrator for California September 18, 1918 directed the Municipality to make arrangements to turn this power over to the Sierra and San Francisco Power Company so that it would be available for general use (R. 408-410), which was accordingly done. (Ost R. 407:11-408:6.) The Pacific Gas and Electric Company had no interest in the Sierra and San Francisco Company at that time, but later became lessee of its system, and later still, acquired its physical properties. (Vincent R. 290:28-291:11; Ost R. 428:9-16.)

This disposition of the Early Intake surplus power continued to 1923 by which time the sales thereof through a period of five years had totalled $200,000 (Solicitor

[16]The contract of July 1, 1925 deals only with energy generated at the Moccasin Power Plant, but the District Court found that "since late in 1935, the electric energy . . . [generated] at the City's Early Intake plant . . . has been and is now being delivered to the Company under the terms of the contract" of July 1, 1925 (R. 161).

Edwards' Opinion, June 8, 1923, R. 345 ft.; Secretary Ickes' Opinion, August 24, 1935, R. 261-262). On May 8, 1923, the National Park Service called the situation to the attention of the Secretary of the Interior (R. 234:1) and this fact gave rise to Solicitor Edwards' opinion of June 8, 1923 (R. 234, 242-254); which is mentioned in the opinion of Secretary Ickes, from which we quote infra, pp. 70-73. (See, also, Opinion of District Court, R. 94:23-95:14; 23 F. Supp. p. 43, c. 2, lines 26-46.)

Opinion of Solicitor Wright: Circumstances Giving Rise Thereto and Attendant Thereon.

The Ordinance of San Francisco authorizing the contract of July 1, 1925 was "passed for printing" (for that term, see R. 219) June 22, 1925, and was finally passed and approved by the Mayor June 29, 1925. (R. 90.) Thus the full text of the proposed contract was publicly known and available June 22, 1925.

Section 2 of that Ordinance provided (R. 89): "As soon as said agreement is duly executed by the parties therein named, a duly executed copy or certified copy thereof shall forthwith be presented to the Secretary of the Interior of the United States at Washington, D. C.".

Within the week June 22-29, 1925, Assistant City Attorney Dailey and Assistant City Engineer Eckart of San Francisco were in Washington conferring with Mr. Edwards, Assistant Secretary of the Interior (in the absence of Secretary Work) about the contract, and Mr. Dailey remained on the same errand to July 4, 1925. (R. 335:4-337:3.) In the meantime, the Ordinance was finally passed and approved by the Mayor, as already stated, June 29, 1925, and the contract was executed July 1, 1925, and would

therefore have been available (through air mail) in the hands of Mr. Dailey before he left Washington on July 4, 1925.

The District Court refused to receive the testimony of Mr. Dailey respecting the substance of his conversation with Mr. Edwards (R. 337:4; Ruling and Exception No. 9; R. 533; Assignment of Error No. 9, here for review), but it is clear that Mr. Edwards received from Mr. Dailey a copy of the contract because Mr. Dailey was pressing for an approval thereof by Secretary Work as one of agency and not one of sale for resale. A copy of the contract was delivered by Acting Secretary Edwards (or by Secretary Work) to Acting Solicitor Wright for an opinion on its validity, for the latter rendered to the Secretary his above mentioned opinion of July 20, 1925, which, however, so far as the record shows, never became public nor known to the Municipality until 1935.

The only purpose of the visit of these representatives of the Municipality to the Department of the Interior was to obtain its approval of the contract as one of agency and not one of sale. In other words, it (the Municipality) sought an authoritative ruling from the appropriate department of the Government that its effort to make an agency contract had been successful. There were no differences of opinion respecting the meaning of Section 6. The Government and the Municipality both fully understood that it prohibited sale for resale and nothing more. No one suggested that the section forbade a contract of agency. The only question therefore that was involved in

the situation was whether the contract of July 1, 1925 was one of agency or one of sale for resale.

Secretary Work having returned to Washington in late July or early August, 1925, the Mayor, and Chairman of the Finance Committee of the Board of Supervisors, of the Municipality went to Washington to procure the approval of the contract by Secretary Work as one of agency and not one of sale for resale. (Dailey, R. 337:19-338:8; 338:15-23; R. 339:12-340:7; 340:20-341:4; 354:23-355:10; 355:15-25.) In the meantime, following the rendition of Assistant Solicitor Wright's Opinion on July 20, 1925, and on a date not shown in the record, a copy of that Opinion was transmitted by the Secretary of the Interior to the Attorney General in order to obtain the latter's advice. (R. 235.) The Attorney General replied August 5, 1925, but the text of that reply is not in the record, although the conclusions reached therein are summarized in Secretary Ickes' Opinion. (R. 235.) Finally, on August 19, 1925, Secretary Work wrote the Mayor of San Francisco, then in Washington, telling him that the Act did not require his approval of the contract, and he would "await a reasonable time until performance shall have indicated whether or not the acts of the parties constitute such a violation of the law as will make action on his part proper". (See text of letter, R. 356-357.) No ruling upon the question, which after all was the question whether the contract was agency or sale, was ever made by Secretary Work. (All of these facts are stated in the Opinion of Secretary Ickes of August 24, 1935, pertinent quotations from which appear infra, pp. 70-73.)

Solicitor Margold's Opinion: Circumstances Giving Rise Thereto.

It is evident that an inquiry was addressed to the Secretary of the Interior in 1933 which called for an interpretation of the Raker Act and that Mr. Margold's Opinion of October 27, 1933 (54 I. D. 316) was given in consequence of the inquiry but without any direct reference to the contract of July 1, 1925. In Secretary Ickes' Opinion in 1935 (R. 243) reference is made thereto, but it is erroneously cited, without title, as appearing in 51 I. D. 316, whereas the citation should have been 54 I. D. 316.

Secretary Ickes' Opinion: Circumstances Giving Rise Thereto and Extracts Therefrom.

Secretary Ickes fixed a hearing respecting the validity of the contract of July 1, 1925 for May 6, 1935 (R. 227-229) and after that hearing rendered his opinion offered in evidence by the Government at the final hearing (R. 232).

This opinion of Secretary Ickes, August 24, 1935, brings out clearly his own ruling that Section 6 of the Raker Act prohibits sale for resale, and that he put the invalidity of the contract of July 1, 1925 on the ground that it involved sale for resale. In the course of his opinion, dealing with the interpretation of Section 6, he said:

Extracts from Secretary Ickes' Opinion.

"In an opinion dated June 8, 1923, the Solicitor [of the Department of the Interior, Mr. Edwards] determined that any sale of Hetch Hetchy power for the purpose of resale was prohibited by the Raker Act. . . . He suggested that an arrangement be made 'by which the grantee [the City and County of San Francisco] would have its power transmitted over the lines

of the concern [Pacific Gas and Electric Company] owning or controlling the existing distribution system'." (R. 234:11-23).

"Presumably as a result of this suggestion the City and County of San Francisco on July 1, 1925, entered into a contract with the Pacific Gas and Electric Company for the distribution of Hetch Hetchy power. . . ." (R. 234:24-28).

"On July 20, 1925, Acting Solicitor Wright [of the Interior Department] rendered an opinion in which . . . he held that the contract [of July 1, 1925] was one of agency or consignment and not one of sale in violation of the provisions of the statute." (R. 234:31-235:8).

"A copy of that opinion was transmitted to the Attorney General with the request that he advise the Department of his views concerning the contract. That he refused to do on the ground that the Department of Justice could not commit itself on a legal question which that Department might subsequently be called upon to litigate.[17] In his letter of August 5, 1925, however, the Attorney General, Mr. Sargent, did indicate the view to be taken on the question. Immediately after pointing out that the contract might be viewed (1) as Proper, (2) as improper, or (3) as proper because temporary, he stated, 'In the exercise of your discretion you may come to the conclusion that this last is the correct view'.[18]

[17]Evidently, the Attorney General felt that if he gave an opinion that the contract was one of agency he would be embarrassed if later called upon to carry on litigation on the basis that it was one of sale for resale.

[18]We understand the meaning of this last sentence to be that the Secretary of the Interior could decide that the contract was proper because temporary, without holding any view as to whether it was proper (generally) or improper.

After receiving that advice, Secretary Work on August 19, 1925, wrote to Mayor Rolph of San Francisco to the effect that no action would be taken by the Department until such time as the facts attendant on the future performance of the contract with the Pacific Gas and Electric Company might be sufficient to indicate whether the provisions of the statute were being met. The contract has been in effect continuously since that time." (R. 235-236)

"The real question is whether the sale or disposition of that power by the City and County of San Francisco under conditions necessarily contemplating its resale by the company to consumers violates section 6 of the Raker Act." (R. 242:14-18)

". . . San Francisco is prohibited from making any sale of that energy to a private corporation with a view to its resale by that corporation to its customers." (R. 243:9-13)

"An explicit prohibition by Congress against the disposition of Hetch Hetchy power to a private corporation for purposes of resale is not to be defeated," etc. (R. 243:24-27)

"San Francisco was granted certain rights on federally owned lands, subject to various conditions, among them those contained in section 6 prohibiting sale for the purpose of resale of any electric power developed on the land." (R. 245:13-17)

"I have concluded that section 6 of the Raker Act prohibits the sale of Hetch Hetchy power for the purpose of resale and that this prohibition is legally valid." (R. 247:1-4)

More Extracts from Secretary Ickes' Opinion.

Thereupon Secretary Ickes proceeded to deal with the contract, and we quote his language in respect thereto as re-assertions of his conviction that Section 6 forbids sale for resale (and nothing more). The Secretary said:

> "In my opinion, in substance this contract is one of sale—sale for the purpose of resale in violation of the statute." (R. 248:20-22)
>
> "It is a contract for the sale of electric power that expressly contemplates resale by the company to the consumers who are its customers." (R. 256:9-11)
>
> "It is my opinion that the provisions of section 6 of the Raker Act are being violated by reason of the sale of Hetch Hetchy power to the Pacific Gas and Electric Company for the purpose of resale." (R. 267:31-268:4)

The foregoing extracts from Secretary Ickes' Opinion make it very clear that his position was (a) that Section 6 of the Raker Act is aimed at sales with the right of resale; and (b) that the contract of July 1, 1925 would have been valid had he found it to be a contract of agency, but inasmuch as he found it to be a contract of sale for purpose of resale, he held it to be in violation of the Raker Act.

Secretary Ickes' Correspondence With Board of Supervisors (S. F.) and the Attorney General 1937.

Later, Secretary Ickes had correspondence with the Board of Supervisors of San Francisco, followed by a letter wherein the Secretary requested the Attorney Gen-

eral to bring this action, of which we quote only so much as bears upon the point which we now have in hand.

Secretary to Board, March 11, 1937: ". . . I have already advised you of my determination that San Francisco is now and for many years past has been violating the provisions of section 6 of the Raker Act by selling Hetch Hetchy energy to the Pacific Gas and Electric Company for distribution to consumers [resale]. . . ." (R. 271:6-11)

Board to Secretary, March 30, 1937: ". . . This Board believes that the agency contract under which City is now acting is fully in accord with the Raker Act". (R. 273:14-17)

Secretary Ickes to the Attorney General, April 2, 1937: ". . . San Francisco was granted the right to construct the Hetch Hetchy Project. . . . Numerous conditions are placed on the grant, among them being one which prohibits the sale of power generated by the grantee on the project for the purpose of resale by the purchaser" etc. (R. 275:15-23)

This action was commenced April 27, 1937, twenty-five days from the last quoted letter of Secretary Ickes to the Attorney General.

Secretary Wilbur in 1930.

In 1930 Secretary Wilbur had discussions with representatives of the Municipality, principally due to delinquency in performance of conditions required by the Raker Act in respect of the construction of roads, trails,

etc. and the contract of July 1, 1925 was incidentally mentioned, but it was spoken of by the Secretary on the theory that it was one of sale for resale and hence in violation of the Raker Act because, so it was assumed on all hands, the act forbade sale for resale. (See Secretary Wilbur's letter of December 8, 1930, R. 322.) The discussion respecting delinquency in the construction of roads and trails was settled by the payment by the Municipality to the Government of $1,250,000 in annual installments of $250,000 each in the years 1932-1936, of which mention is made, supra, p. 31.

We submit that the foregoing shows beyond peradventure that whenever it had occasion to consider Section 6 in the period 1913-1937, the Department of the Interior invariably dealt with the section upon the basis that it forbids sale for resale, and nothing more.

(c) Through the final hearing in the District Court the Department of Justice maintained that Section 6 forbids sale for resale (and nothing more) and that the contract of July 1, 1925 violated that Act merely because it was one of sale for resale and not a contract of agency; the District Court, accepting the theory of the Government, so held; and the Department of Justice did not abandon its said position when, for the first time, four months after the final hearing and on February 26, 1938, it first argued that Section 6 also forbids an agency of a particular type. Moreover, through the hearings in the District Court and in the Circuit Court of Appeals the Government continued to maintain that Section 6 forbids sale for resale.

In Point 1 of Argument, supra, p. 54, we seek to maintain the propositions just stated in the caption to this point as the basis of a claim that the position of the Government in its Petition for Certiorari and in

the Brief for the United States was diametrically opposed to the position taken in the Courts below and that it should be denied the privilege of here arguing positions not taken below and diametrically opposed to the positions taken by it in the two Courts below.

We now desire to cite the same course of conduct as evidence from a Department of the Government that our construction of Section 6 is sound.

It is unnecessary to repeat the facts assembled in subdivisions (g), (h), (i) and (j), supra, pp. 12-25, and accordingly, we submit the proposition with which this point is entitled upon what is there shown.

CONCLUSION.

We therefore submit that the proceedings in Congress and the positions of the Department of the Interior and the positions of the Department of Justice in this action show that all of them have interpreted Section 6 as one forbidding sale for resale, without more.

We now pass to the consideration of the meaning of Section 6 considered textually and without reference to any view expressed thereon in Congress, or in the Department of the Interior, or by the Department of Justice.

5. The language of Section 6 is a clear and unequivocal prohibition against sale of electric energy to any private corporation or individual for the purpose of resale, which fully appears without resort to Congressional debates or the interpretation put upon Section 6 in the Department of the Interior or by the Department of Justice in this action.

This brings us to a consideration of the forty-nine words which make up Section 6. We emphasize the words be-

cause howsoever they may be construed they control the dominant questions in the case. We seek to determine what the words mean.

There is no occasion again to dwell upon the circumstance that Section 6 was copied from Section 6 of The Owens River Grant nor that the provision in The Owens River Grant came from a dictation of President Theodore Roosevelt, as we have already covered that ground, supra, pp. 7-12.

The language employed in the three instances clearly shows and the words employed in each case are implicit with recognition of the fact that each of the municipalities was to engage in the sale of water, all on a large scale and with lawful authority to do so.

Indeed, the Raker Act required San Francisco in given events to furnish electric energy for commercial uses and necessarily in large quantities. In each grant Congress was making provision in respect of sales by the municipality involved to a corporation or an individual and in respect of each sale was prohibiting "a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed." (Govt. Supp. Br. C. C. A., p. 7, lines 10-15, quoted supra, p. 6.)

The whole idea was that title of the Municipality to the water or electric energy should not pass to another (private corporation or individual) coupled with the right of that other to resell or sublet.

The language employed in Section 6 of the Raker Act is to be treated as that of President Theodore Roosevelt. In 1906, seven years before the Raker Act was passed, he

was expressing the idea that a sale or lease of water for irrigation purposes by Los Angeles should not carry a right to the buyer to resell or sublet. The President was not considering, so we think ourselves entitled to assume, any legalistic questions. It must be assumed that he was aware that a sale or lease of water without restrictions would afford the purchaser a right to resell or sublet. This he desired to prevent and he expressed the purpose in language different than would have attended a similar effort by an outstanding legislative draftsman of long professional and technical training. We submit however that the President expressed his purpose; that he made it clear that the prohibition was aimed at unrestricted sales and leases and that his words required that sales and leases should carry limitations against resale or subletting, if, when and as necessary.

The Owens River Grant involved the generation of electric energy but there was no provision in the bill against sale or subletting thereof for resale or subletting. This was undoubtedly due to the circumstances under which the prohibition was formulated. It all turned on the question of the disposition of water for irrigation purposes. This was the concrete problem presented to the President and no account was taken by him of electric energy nor of water except for irrigation purposes.

When the prohibition was amended for insertion in the Owens River bill (after the conference with the President) it was concluded that there should be a restriction against sale for resale of all water whether for irrigation or otherwise, and accordingly, the words "for irrigation purposes" were stricken.

The prohibition is akin to a covenant against assignment or subletting in a lease; and akin to a deed, with building and other restrictions qualifying and limiting the general words of a grant and the enjoyment of the grant.

The prohibition of Section 6 in the Raker Act of 1913 is to be interpreted as Section 6 of the Owens River Grant and the Dictation of President Theodore Roosevelt, both dating from 1906, would be interpreted.

The meaning of Section 6 of the Raker Act is clear if attention is riveted upon the concluding words of the provision which are ". . . the water or the electric energy sold . . . to it [any corporation] or him [any individual] by the said grantee", i.e., San Francisco. These words presuppose sales by the Municipality and forbid the Municipality in connection with certain of its sales to pass to the purchaser the right himself to sell.

If a sale were made "to any corporation or individual", the prohibition applied, but if the sale were to "a municipality or a municipal water district or irrigation district", the prohibition did not apply.

We submit that the last clause in Section 6, read with the other language therein with or without the addition of implied words, clearly shows that the purpose of the section was to forbid sale by the Municipality for resale by the purchaser in the instances to which the prohibition applied.

6. It being made to appear that Section 6 forbids sale for resale, it follows that there are no other prohibitions therein because the prohibition of sale for resale exhausts the content of the section, both of words and ideas. There is no language in Section 6 which can be interpreted to deal with a contract of agency or to forbid the same. (See Opinion of Circuit Court of Appeals, R. 674; 106 F. (2d) 575, c. 1, lines 19-29; R. 676-677; 106 F. (2d) 575, c. 2, line 49 to 576, c. 1, line 2.) The argument for this latitudinarian construction of Section 6 contended for by the Government is rendered all the more impossible by the concessions of the Government in the Circuit Court of Appeals (a) that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; (b) that it does not "prohibit employment of an agent for transmission purposes"; (c) that "the Government has never contended to the contrary" of either proposition; and (d) that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C. C. A. p. 8, quoted infra, p. 81); concessions seemingly repeated by implication in Petition for Certiorari, p. 7, footnote 5, last line, and in terms renewed in Brief for the United States, p. 12, quoted supra, p. 20.

In the Circuit Court of Appeals the Government claimed that there were words in Section 6 which properly construed forbade a contract of agency. These words were "selling or letting" and "sold or given", particularly "letting" and "given".

The argument of the Government first advanced in the District Court four months after the final hearing in Reply Brief for Plaintiff (U. S.) February 26, 1938 (supra, p. 18) "that even an agency agreement might be beyond the limitations imposed by Section 6 of the Raker Act" was noted in the opinion of the District Court (R. 120 foot; 23 F. Supp. 52, c. 1, lines 7-9) but no comment upon the soundness thereof was made. The case in the District Court was decided upon the theory upon which the com-

plaint was brought, namely, that the contract of July 1, 1925 violated Section 6 of the Raker Act because it was a contract of sale for resale and that section forbade such sale for resale.

We shall later deal with the Government's contention that there is language in Section 6 which should be construed to be a prohibition of agency, but, in the meantime, we wish to call attention to the concessions of the Government made in the Circuit Court of Appeals that Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent; that it does not "prohibit employment of an agent for transmission purposes"; that "the Government has never contended to the contrary" of either proposition; and that "there is nothing in the decree which requires that the City make distribution without an agent" (Govt. Supp. Br. C. C. A. p. 8).

The exact language used was this:

> "Contrary to the statement in the [Municipality's] Outline of Oral Argument (p. 17), the Government has never argued 'that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent' and there is nothing in the decree which requires that the City make distribution without an agent. . . . Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353-355) and the Government has never contended to the contrary."

These concessions were adopted by implication in Petition for Certiorari, p. 7, fn. 5, last line. They were also reenforced with the following from Brief for the United

States, p. 12: "While the Government does not take the position that the statute inhibits the employment of the Company as a carrier for the transmission of power generated by the City, provided the sales are made by the City, it does contend" etc.

In considering these concessions it is to be remembered that the generation and consumption of electric energy are practically simultaneous. It cannot be said that one precedes the other by a moment of time. The ultimate consumer obtains the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., which being connected with the generator in the power house, automatically causes the generation of the energy—the throwing or turning on of the switch or the plugging of the socket or the pressing of the button, etc., the generation of the energy in the power house and the transmission to the consumer being practically simultaneous, as already stated.

The Newark station of the Company where the Municipality delivers its electric energy is forty miles from San Francisco. (Vincent, R. 282:11.) Electricity travels with the velocity of light, i.e., at the rate of 186,000 miles per second, and hence the time involved between Newark and San Francisco is 1/4650ths of a second.

In *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), speaking of electric energy, this Court noted that "the generation and transmission are apparently simultaneous and both respond instantaneously to the turning of a consumer's switch". (p. 165, syl. 1.) These views are supported by Dr. Robert A. Millikan, the famous American

physicist, in testimony quoted in *South Carolina Power Co. v. South Carolina Tax Commission* (D. Ct. S.C., 1931), 52 F.2d 515, 523, c. 1, line 22, at p. 523, c. 1, line 45 to p. 524, c. 1, line 23), and are likewise the views of Sir Joseph John Thomson, F.R.S., the great British physicist. (See "Electricity" in The Encyclopedia Britannica, 14th Edition, Vol. 8, pp. 190, col. 1 and 304, col. 1.)

With these characteristics respecting the generation, transmission and consumption of electric energy, it is pertinent to ask the question which follows:

If the Municipality may employ the Company as "an agent for transmission purposes" (see Petition for Certiorari p. 7, footnote 5) or employ "the Company as a carrier for the transmission of power generated by the City" (Brief for the United States, p. 12). What meaning is to be ascribed to the limitation in Brief for the United States, p. 12, when it says "provided the sales are made by the City"?

The Company transmits the energy of the Municipality to the switch of the consumer and the Government concedes that that may be done lawfully. The Government says, however, that the agent "sells the water or energy"; but this is not true in a legal or in any other sense. The Municipality has employed a distributor who makes the energy available to the consumer when he throws his switch and a sale occurs through the offer of the energy by the Municipality and the taking in thereof by the consumer.

There is nothing in Section 6 which says an agent may transmit but he must not bill the consumer nor collect from him.

There is one practical test to which the whole argument of the Government might be put. Let us assume that the Municipality was distributing its own energy and that the Company was distributing its energy. Would the Raker Act prohibit the Municipality from employing a canvasser for business or an agent (corporate or individual) to sell its electric energy?

In challenging the power of the Municipality to sell its electric energy through the Company, as its agent, the Government would seemingly thereby disqualify the Municipality from selling at all, inasmuch as a corporation, including a municipal corporation, such as the District of Columbia, "can act only by its agents or servants". (*Barnes v. District of Columbia*, 91 U. S. (1 Otto) 540, 545 (1876). See, also, *Dearborn v. Grand Lodge*, 138 Cal. 658, 663 (1903); *Scott Stamp Co. v. Leake*, 9 Cal. App. 511, 516 (1908); *Bullock v. Consumers' Lumber Co.*, 3 Cal. Unrep. 609, 617, 31 Pac. 367 (1892); 6A *Cal. Jur.* "Corporations", § 13, p. 60; § 642, p. 1131; 43 *Corpus Juris* "Municipal Corporations", § 235, p. 236; § 1186, p. 707.)

Moreover, it is contrary to all ideas to forbid one to act through an agent. "He who acts through another acts by himself". 1 McKinney New Calif. Digest p. 3. "Qui facit per alium, facit per se". 51 *Corpus Juris* 294.

We reserve for consideration, infra, the argument in Brief for the United States, p. 22, that this is a legal fiction, and therefore, as we understand the Goverment, a municipality selling through an agent is not itself acting.

If it were proper to say that some agencies are not prohibited but other agencies are forbidden, it would be necessary to find words in Section 6 to carry this new idea; in fact, the idea partakes of both a negative and a positive character, for although, if no agency is prohibited, there is no need to mention agency at all, nevertheless it is clear that if some are prohibited and others are not prohibited, the fact must be shown by language in the section at once positive and negative. There is no such language.

Passing this phase of the question, we return to the words of Section 6 out of which the Government seeks to spell a prohibition against agency, and in that connection, it is to be noted that Section 6 is a prohibitory law and those things only are forbidden which are specified as prohibited. The prohibition is levelled against "selling or letting" alone; and nothing is forbidden which is not embraced within "selling or letting".

There is no prohibition against agency.

Section 6 merely prohibits the Municipality from "selling or letting". Therefore, there is no scope of language to sustain wider prohibition. Specifically there is nothing to justify the idea that agency is prohibited. The Circuit Court of Appeals so held. (R. 674, line 15; 676, line 25; 106 F.2d 575, c. 1, line 19; 575, c. 2, line 49, quoted supra, pp. 23, 24.)

In support of this ruling we call attention to the four groups of three words each in Section 6, which we indicate by underlining below:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee."

The first group "selling or letting" furnishes the subject of the prohibition; "selling or letting" (something) is forbidden and that is all that is prohibited. "Selling or letting" does not need interpretation.

Letting is another way of saying leasing, which is doubly clear when we connect "letting" with the word "sublet" later appearing in the section. See opinion of Circuit Court of Appeals (R. 677, line 6; 106 F.2d 576, c. 1, line 5), where it is said:

> "The term 'letting' in Section 6 obviously means leasing. This is clear by the use of the word 'to' between the word 'letting' and the words 'any corporation' in the section."

The words "selling or letting" are to be tied to the words "sell or sublet". "Sell" is a second "selling"—it is resale; "sublet" is a second "letting".

The words "selling" and "letting" are plain and simple. They prohibit a "selling" with "the right to sell" [resell]. They forbid a "letting" with the right to "sublet". The prohibitions apply to water or energy "sold" [transfer of title for a consideration] or "given" [including say transfer of title involved in "letting"].

The plain meaning of the section is that whatever interest in water or electric energy is passed on by the

Municipality to a private corporation or individual shall be for the latter's personal use ("buyer's own consumption")[19] and not to be by "it or him" transferred anew.

The prohibition is against "selling", i.e., against a sale, and against "letting", i.e., against a lease. In a sale "one transfers to another an interest in property". In a lease "one transfers to another an interest in property", but it is usually a lesser interest than is imported by a "sale". This is all shown in the law of real property and the illustrations may be adapted to personal property.

Holt v. City of Montgomery, 212 Ala. 235, 102 So. 49 (1924): "A lease is a . . . grant of an estate in land"; *Waskey v. Chambers*, 224 U.S. 564, 565-566 (1912): "The right of a lessee is the same as that of a purchaser in fee".

The second group of three words in Section 6 above underlined are "sell or sublet". As we have just made clear, these words require no interpretation. In the context, "sell" refers to a second sale—a resale, and "sublet" to a second letting, i.e., leasing.

These words mean "[re]sell or sublet". Plainly, the word "sublet" means a second letting. The first letting is the one from the Municipality to X and the second letting, would be one from X to Y, if allowed. So likewise in re-

[19] *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U.S. 165 (1915) involved a contract of sale where the vendee "bought the goods exclusively for purchaser's own use."

Fosburgh v. California & Hawaiian Sugar Refining Co., (CCA 9, 1923) 291 Fed. 29 dealt with a contract by a sugar refining company to sell sugar to a candy company wherein it was provided that "buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same."

spect of the word "sell". That is a second sale; the first sale being from the Municipality to A, and the second sale being from A to B if allowed.

(In connection with the foregoing we desire to make the point, that both of the clauses have to be taken into account in the interpretation of the section.)

The third group of words "sold or given" presents no difficulty. The word "sold", standing alone, could not give rise to discussion. This is equally true in respect of the word "given".

The word "given" first appeared in President Theodore Roosevelt's Dictation, where it was not associated with the words "sold or" but stood alone. The words "sold or given" appeared for the first time in Section 6 of The Owens River Grant.

The word "given", when used in the Dictation, clearly referred to the words "selling or letting" and meant as indicated by the supplied words which follow: "the water given [i.e., by way of sale or lease, as aforesaid] to it or him by the city" and referred to nothing else than the act of "selling or letting" which was the correlative of the word "given".

The word "given" does not enlarge the prohibition of "selling or letting"; it merely identifies "the water or the electric energy".

Striking proofs that the words "sold or given" are words to identify "the water or the electric energy" arise from the statement of the Government that "The right to sell, granting of which is prohibited by section 6, is the right to sell the Hetch Hetchy water or energy

obtained from the City" (Govt. Supp. Br. C.C.A. p. 4, lines 3-7, quoted supra, p. 5); and that "the breach occurs not in the sale, but in transferring with it the right to sell". (Govt. Supp. Br. C.C.A. p. 9, lines 11-13, quoted supra p. 6.)

The addition of the words "sold or" in Section 6 of The Owens River Grant did not alter the meaning of "given" as it stood in the Dictation; and in that dictation the word "given" referred to both "selling" and "letting", but inasmuch as the word "sold" was by later amendment specifically added, the effective function of the word "given" thenceforth was to be the correlative of "letting". Of course, when the word "given" stood alone in the Dictation, it had as correlatives both "selling" and "letting", but the draftsman of Section 6 of The Owens River Grant, to make assurance doubly sure, added the words "sold or", thus giving us "sold or given". If the word "given" in this connection had no historical background and its meaning were doubtful, interpretation would attribute to it a definition akin or having relation to the word "sold", say, as involving, transfer of title. The maxim of *Noscitur A Sociis* (46 Corpus Juris 496) would apply ("The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it")—a maxim akin to *Ejusdem Generis*. (19 Corpus Juris 1255.)

The word "give" has many meanings, but when it is read in the environment in which we find it here, it deals with transfer of title.[20]

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[20] "The word 'grant' is synonymous with 'give'. (Webster's Dictionary)". *Gurnsey v. Northern California Etc. Co.*, 7 Cal.

The fourth group: Next, there can be no dispute about what is meant by the words "it or him" which constitute the fourth and last group of three words each underlined above. They refer and are to be tied to "any corporation or individual", so that they should be read—"it [any corporation] or him [any individual]."

With these four groups of three words each shown to be of clear and unmistakable import, and none of them giving rise to any prohibition of agency, nothing remains

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App. 534, 544 foot (1908). "Ordinary and accepted meanings of 'give' and 'receive' are synonymous with those of 'grant' and 'accept'." *Standard Oil Co. of Indiana v. United States* (C. C. A. 7, 1908), 164 F. 376, 390 foot; *United States v. Bunch* (D. Ct. Ark. 1908) 165 F. 736, 739 foot. "The word 'given' as used in statute modifying the rule in Shelley's case [such as Section 779, C. C. Cal.] means conveyed." (Carter v. Reserve Gas Co., 84 W. Va. 741, 100 S. E. 738, syl. (1919).)

"The word 'give' is as expressive of a transfer of title as the word 'sell'" (In re Sonlard's Estate, 141 Mo. 642, 43 S. W. 617, 622, c. 2, ls. 49-51 (1897)), and while in proper context, it would mean a transfer of title without consideration, it does not exclude a transfer of title upon consideration. Latimer v. Bruce, 151 Ga. 305, 106 S. E. 263 (1921) held that an answer alleged "a contract upon a valid consideration" although the promise alleged was that "he would give her the property". The opinion says that "the word 'give' as employed in the answer, when considered in connection with the context, does not denote a technical gift" (p. 263, c. 2 middle). In times past words of conveyancing were "to give, grant and confirm" land to A. If the consideration was money, the deed operated as a bargain and sale, and if not for money, it was good as a covenant to stand seised. Harrison v. Austin, 3 Mod. 237, 87 Reprint 154 (1793); Cheney's Lessee v. Watkins, 1 Harris & Johnson 527, 2 Am. Dec. 530 (1804); Young v. Ringo, 17 Ky. (1 T. B. Mon.) 30 (1824); Bates v. Foster, 59 Me. 157, 8 Am. Rep. 406 (1871). In Carter v. Alexander, 71 Mo. 585 (1880) it was held that the word "give" in a contract so far as it was related to land should be taken in the sense of "convey".

Evenson v. Webster, 3 So. Dak. 382, 53 N. W. 747 (1892) held that the instrument under review was a grant, although the word used was "give".

upon which the Government can base a claim that Section 6 did anything more than to prohibit sale for resale.

There are prohibitions in Section 6; the prohibitions go as far as they go and no farther; they forbid sale for resale; plain words are used and no interpretation of those words is needed. "The restraint upon alienation must not be exaggerated" as said in *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907), where it was held that a prohibition against sale of tribal lands by Indians did not forbid the cutting of timber for sale and the sale thereof.

In the foregoing we have not dwelt as much as we might upon the words "letting" and "sublet". Clearly, when there is a prohibition of "letting" "the right to sublet" a transfer of property capable of being leased and sublet is involved and the prohibition clearly forbids one to let property with the right in the lessee to sublet. Seemingly, nothing could be plainer.

7. In claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function". (298 U.S. 237.) The prohibition of Section 6 is free from ambiguity and there is no necessity for statutory construction. As it forbids, so far as pertinent here, sale for resale and that only, it is not to be interpreted to forbid agency. There is no justification for enlarging the statute by interpretation to contain such a prohibition.

Cutten v. Wallace (CCA 7, 1935) 80 F.2d 140, 143 footnote, assembles numerous cases to the point that "where there is no ambiguity in words of statute, there is no room for statutory construction".

In *Wallace v. Cutten*, 298 U.S. 229 (1936) Mr. Justice Brandeis, affirming the judgment in the last case cited and speaking for a unanimous Court, said (pp. 236-237):

> "The Government argues that . . . . the literal construction thus given [in the court below] to §6(b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act. . . .
>
> It would be inappropriate for us to discuss these, and other, arguments presented. The language of §6(b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said [by us in another case] . . . . 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

In *Seaboard Acceptance Corporation v. Shay*, 214 Cal. 361 (1931), the Court said (p. 365):

> "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. . . . It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the legislature must be determined from the language of the statute."

The following are to like effect.

> "The intention of the Congress is to be sought for primarily in the language used, and where this ex-

presses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture." (*Thompson v. United States*, 246 U.S. 547, 551 (1918).)

". . . in support of his contention, petitioner invokes history of the legislation, but that is not here permissible for the language and meaning of the statute in respect of the question under consideration are clear." (*Wilbur v. United States*, 284 U.S. 231, 237 (1931).)

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used." (*Helvering v. City Bank Co.*, 296 U.S. 85, 89 (1935).)

". . . as this court has so often held, where the words are plain there is no room for construction . . . if the language be clear, it is conclusive." (*Osaka Shosen Line v. United States*, 300 U.S. 98, 101 (1937).)

"The terms of the act are free from ambiguity, and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress." (*Jeu Jo Wan v. Nagle* (CCA 9, Opinion by Rudkin, C.J. 1925) 9 F.(2d) 309, 310, c. 1 top.)

"The applicable provisions . . . are not ambiguous; the language used clearly expresses the intention of Congress. Its intention, where the language of the act is unambiguous and its meaning plain, is to be gathered from the act itself and not from what some member of the legislative body may have stated in committee or elsewhere. The language of this act speaks for itself; it does not call for construction." (*Commissioner of Internal Revenue v. Adams* (CCA 1, 1931), 54 F.(2d) 228, 229, c. 2 foot.)

"There seemingly is no canon of statutory construction better settled than the one which forbids reference to Congressional Records or to statements of legislators except in cases where the language of the statute is doubtful, uncertain or ambiguous." (*United Electric Coal Companies v. Rice* (CCA 7, 1935, cert. denied 297 U.S. 714), 80 F.(2d) 1, 8, c. 2 foot.)

"The legislative intent must be gathered from the plain meaning of the words used in a statute." (Syl, *Dart Drug Co. v. United States* (5 CCA, 1938), 99 F.(2d) 757.)

Upon the foregoing authorities, we submit that in claiming that Section 6 prohibits an agency, the Government is asking "not a construction of a statute but in effect an enlargement of it by the Court" which "transcends the judicial function" (298 U.S. 237).

8. The prohibitions of Section 6 are not to be enlarged having regard to an assumed policy in the enactment of the statute, for the authorities are innumerable to show that such appeals are always in vain unless there are provisions of the statute to support them.

"We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

United States v. Chase, 135 U.S. 255, 261 (1890).

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Hadden v. Barney, 72 U. S. (5 Wall.) 107 (1866).

"I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."

Lord Tenterden, C. J. in *Brandling v. Barrington*, 6 B. & C. 467, 108 Eng. Rep. 523, 527 (1827).

"I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the Legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14."

Holroyd, J., *same case* (p. 527).

"The true way in these cases is to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning and supply the defect in the previous Act."

Crawford v. Spooner (1846), VI Moore P. C. 13 Eng. Rep. 582, 585.

See, also:

Estate of Barnett, 97 Cal. App. 138, 142 (1929);
M'Cowan v. Baine [1891] App. Cas. 401, 409;
Tompkins v. First Nat. Bank, 18 N.Y.S. 234, 235 (1892).

9. There is no merit in any other argument made in the Brief for the United States to overthrow the proposition (a) that it is the purpose of Section 6 to and that it does prohibit sale for resale; or (b) that it does not prohibit a contract of agency.

In considering the arguments in the Brief for the United States (filed here March 8, 1940) in respect of the interpretation of Section 6, it is necessary to have at hand the theories of the parties respecting Section 6 from beginning to end in the Courts below. Hence, with some repetition, we state them in a summary way.

(a) From the beginning until after the final hearing in the District Court, the Government's theory of the case was (a) that Section 6 forbade sale for resale (without more); and (b) that the contract of July 1, 1925 was invalid because it was a contract of sale for resale.[21] The Municipality agreed that Section 6 forbade sale for resale, but denied that the contract was one of sale for resale, and claimed it was one of agency. At the final hearing, the sole question (disregarding defenses overruled by the District Court[22] and not dealt with in the Circuit Court of Appeals) was whether the contract was one of sale for resale or of agency.

[21] See supra, pp. 12-20.
[22] See footnote 12, supra, p. 28.

Four months after the final hearing and in its closing brief, the Government made its new contention that Section 6 also forbade a contract of agency and that therefore the contract was invalid even if a contract of agency, but it added this new contention to the one which it had theretofore made and did not abandon the earlier.

The District Court held that Section 6 forbade sale for resale and that the contract was one of sale for resale,[22] and entered its decree for the United States. It mentioned the argument of the Government that the section also forbade a contract of agency but it did not enter upon a consideration of the point. (R. 120 ft., 23 F. Supp. p. 52, col. 1, lines 6-9.)

Upon appeal, the Government and the Municipality agreed that Section 6 forbade sale for resale. The Government contended that it also forbade a contract of agency, which the Municipality denied. The Municipality reasserted its position taken in the District Court that the contract was one of agency and did not violate Section 6 inasmuch as the section did not prohibit a contract of agency.

The position of the United States in the Circuit Court of Appeals was "that the terms of Section 6 prohibit not

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[22] We are constantly considering whether the contract of July 1, 1925 is one of sale for resale. Had the contract been a contract of sale, it would have been one of sale for resale because obviously the Company was not receiving the energy at Newark for its own consumption. Therefore, if the contract were held to be one of sale, it would follow that it was one of sale for resale.

only a sale for resale but the creation of an agency by the City" etc. (Opinion CCA, supra, p. 25, line 6.)

The Circuit Court of Appeals accepted the argument of the Government "that the terms of Section 6 prohibit . . . sale for resale" but decided against its contention "that the terms of Section 6 prohibit . . . the creation of an agency by the City" etc. (Opinion, supra, p. 25, line 6.) The Court also decided against the Government's contention that the contract is one of sale for resale and held it to be one of agency. Thus the Circuit Court of Appeals reversed the decree of the District Court.

In the Petition for Certiorari it was argued that Section 6 does not forbid sale for resale; that the terms of the section do not deal with sale for resale; and that "the 'selling' prohibited is not the selling of energy for resale but the selling of the right to sell energy." (Petition, p. 8.)

In Brief for the United States (p. 18) it is argued that "The 'selling' expressly prohibited is not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

The Government thus argues (and did so for the first time in the Petition for Certiorari) that Section 6 does not prohibit the selling of the commodity (i.e. water or electric energy) for resale, but that the prohibition is against selling the right to sell energy, and that only by implication does the prohibition against selling the right prohibit the selling of the commodity for resale.

(b) The Government has been driven to far fetched expedients to sustain the new theory respecting Section 6 put forward in Petition for Certiorari and in Brief for the United States.

In the first place, it practically throws overboard the idea of "selling" the right to sell and adopts a phrase better suited to its fallacies, i.e., "granting the right to sell". This departure involved a new requirement expressed in the words "for a consideration", making the phrase "grants for a consideration, the right to sell".

The motive which prompts the use of the words "for a consideration" is obvious. The Government found itself confronted with "selling . . . the right to sell" and did not feel that "granting" was an adequate substitute unless the words "for a consideration" were added because, with such an addition, the Government felt satisfied it could say "a grant" "for a consideration" is a "sale" and therefore would meet the requirement of the word "selling" in Section 6.

The Government also uses the word "endowing" in place of the word "granting", presumably on the theory that "endowing" better harmonizes with its argument for "a grant" from a principal to an agent.

The Brief speaks of "granting", "vesting", "endowing", "transferring", "disposing of" or "controlling" the "right to sell" twenty-two different times, at the pages and lines listed below;[24] and of the investiture of

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[24] 2:21-22; 2:25-26; 3:15; 3:19-20; 9:9-10; 9:22-23; 9:27; 10:7-8; 10:19-20; 12:19-20; 13:5-6; 13:14; 17:15-16; 18:24,25; 19:10-11; 19:15-16; 19:28-29; 20:9-10; 20:25-26; 20:27; 34:15-16; 35:2.

the right to sell "for a consideration" eleven times,[25] but speaks of "selling" or "sale" of the right to sell, disregarding quotations of Section 6, only seven times.[26]

(c) Although Section 6 speaks of "'letting' . . . the right to . . . sublet" this phrase of Section 6 is not dwelt upon in Brief for the United States; and this phrase (except where it occurs in quotations from Section 6) is not mentioned in the Brief save in the sentence printed in the footnote.[27]

The Government wisely abstained from testing its argument by applying it to "letting . . . the right to . . . sublet". The moment the word "sublet" is dwelt upon the whole purpose of the section is luminous because it presupposes a lease to A, say, of water or energy which he is denied the right to sublet. If instead of "sell or sublet" the words had been "resell or sublet" the argument in the Brief would never have been made (so we must assume), and yet, when we have the word "sublet", we are compelled to say that "sell" means "resell" (See Ellipsis, fourth version, supra, page 4, and readings of Section 6 and its prototypes distributively, supra, pages 9-11).

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[25] 9:22; 10:7-8; 10:19; 12:18; 13:6; 19:10; 19:16; 20:9; 20:13; 20:22-23; 34:15-16.

[26] 10:14; 13:11; 17:9-10; 18:10; 19:5-6; 21:1-2; 21:8. The words appear in quotations of Section 6 as follows: 2:7-9; 4:24-27; 9:19-20; 12:9-10; 14:5-6; 14:29-30; 18:5-7.

[27] "The district court . . . entered a decree enjoining the City from disposing of energy . . . in any . . . manner whereby the right to sell or sublet such energy is vested in any individual . . ." (Br. 3:14-20.)

(d) In thus ringing the changes on and repeating the words "grant" or "granting", the Brief does not mention the fact (which it might have done) that **neither the word "grant" nor the word "granting" is contained in Section 6.**

The word which the Brief should have used on the twenty-two occasions above mentioned was either the word "sell" or "selling". In other words, it should have spoken of "selling to the Company the right to sell energy", but seemingly, so we assume, the argument would lose caste if the Brief had used the word "sell" or "selling" in the place of "grant" or "granting" on these numerous occasions, and, so, it took the course frequently employed in hard driven arguments, i.e., to omit the true word and substitute a false one.

(e) The word "selling" in Section 6 contemplates a transfer of title. "It is fundamental that to constitute a sale there must be a transfer of title" (Opinion of Acting Solicitor Wright, July 20, 1925, R. 366, lines 1-3). The Municipality says the section refers to "selling" a commodity. The Brief argues that "selling" refers to "a right to sell". It would seem to follow that in such a case there would be a transfer of the right to sell. Selling and the transfer of title to the thing sold are inseparable. If there is a selling of a right to sell, a transfer of the right to sell is implied. Therefore, if the circumstances show that a transfer of the right to sell is not intended but a mere authority then there is no grant of the right to sell and the whole argument falls to the ground. If the "grantor" only authorized the Company to sell upon behalf of the grantor there would be

only an agency and neither "transfer" nor "grant" of the right to sell; and the use of the word "grant" would be inapposite to the last degree.

All this turns on what is sold: is it energy or "the right to sell energy"? If energy is sold, of course the title thereto passes, and if the right to sell is the thing sold, title to the right to sell is transferred, which is inconsistent with any idea of agency whereunder the agent is merely endowed with authority.

(f) In its Petition for Certiorari, the Government might have renewed its argument made in the Circuit Court of Appeals "that the terms of Section 6 prohibit not only a sale for resale but the creation of an agency by the City" etc. (Opinion, supra, p. 25, line 6), but there was a reason and an important reason why it did not do so; why it executed a volte face. The reason was that if Section 6 forbade sale for resale, that fact accounted for all of the words in the prohibition and there were no other words which it could seize upon to justify or to give countenance to the argument that the prohibition also covered a contract of agency. In other words, the Government recognizes that it can not maintain that Section 6 prohibits agency if it concedes that it forbids sale for resale, because, as we pointed out below and do so again here (supra, point 6, page 80), the prohibition of sale for resale exhausts the content of the section, both of words and ideas. Therefore, in the Petition for Certiorari (p. 8 foot), the Government declared that "the 'selling' prohibited is not the selling of energy for resale" (supra, subd. (k), p. 25); and in Brief for the United States it says (p. 18, ftn. 9) "The 'selling' expressly prohibited is

not the selling of energy, but the selling of the right to sell energy. The selling of energy for resale is prohibited by necessary implication in that a sale of energy without reservation necessarily confers on the purchaser a right to sell what he has purchased."

(g) In the Specifications of Error, Brief for the United States, p. 9, the misuse of language by the Government is to be noted. It is said that the Circuit Court of Appeals held that Section 6 "does not prohibit the granting to private corporations of the right to sell electric energy originating at Hetch Hetchy as agent for the City". The Court did not couch its conclusions in any such language nor in language which justifies description thereof by the language quoted. The Court held that a contract of agency is not forbidden by Section 6 and said nothing about "the granting . . . of the right to sell . . . as agent for the City" as shown in the Brief where it is said that "The circuit court of appeals, only two judges participating, reversed, with instructions that the complaint be dismissed (R. 678). It held that the contract is one of agency rather than sale and that the Act does not prohibit the sale of energy by the Company as agent for the City (R. 661-677)." (Brief, p. 3.)

(h) The Brief stresses the word "given" found in Section 6 with the words "sold or". We have fully covered the history, meaning and significance of the word "given" and shown that from the Dictation of President Theodore Roosevelt thenceforward, its purpose was to identify the commodity, first, water alone, and afterwards, water and electric energy, either sold or leased by the Municipality (supra, pp. 88-89 and fn. 20) and, further,

that, in the Dictation, the term "given" was used in a comprehensive sense, to cover both "selling" and "letting" (i.e. leasing).

(i) The Brief argues that Section 6 forbids any disposition of water or electric energy except through sales "by the City directly to consumers". (p. 16 ft.)

There is no support for these declarations in the text of Section 6 nor in any other provision of the statute; and we note that the Government does not claim that there is any provision of the statute dealing with the subject except Section 6. Furthermore this argument overlooks the fact that the language of Section 6 came to be employed in a comparable situation seven years before. (1906-1913.)

(j) The statement quoted from Solicitor Edwards' opinion (Brief, p. 8, ftn. 4) "that the Act clearly contemplates public ownership, sale and distribution" (R. 346) is misleading for the want of the words with which the quoted words were connected, which are "and not merely the development of water and power for sale to private concerns for resale and distribution. The legislative history of this law amply supports this interpretation of the language employed in the Act". (R. 346 foot 347 top.)

(k) The Brief does not deal with the suggestion made by judges of the Circuit Court of Appeals at the oral argument May 19, 1939 that it might be held that the prohibition of Section 6 was not concerned with a sale of water or electric energy but prohibited "selling" ("leasing" not mentioned) a franchise to sell ("sublet" not

mentioned) (Opinion, R. 674-675, 106 F. (2d) 575, c. 1, pars. 12-13.)

If this suggestion had prevailed, a reversal of the District Court would have resulted with, we submit, dismissal of action "even if the contract of July 1, 1925 constituted a sale of electric energy to the Company to be resold by it to the inhabitants of the City" (Opinion, R. 675 foot, 106 F. (2d) 575, c. 2, lines 10-18) inasmuch as the City had not granted the Company any franchise to sell. Counsel for the City were of the opinion that the suggested interpretation of Section 6 was not the true one and would not endure and therefore dissented therefrom. The Government likewise dissented. Leave was given to the parties to file briefs following the oral argument which they did. In the briefs each of them insisted that it was the purpose of Section 6 to and that it did prohibit sale for resale. See quotations from Govt. Supp. Br. CCA July 10, 1939, supra, pp. 5-6, and Opinion CCA, pp. 24-25, supra, pp. 5-6.)

(In the briefs filed before the oral argument, the parties were in agreement that Section 6 forbade sale for resale, without more, and therefore the attention of the judges was not called to the genesis of Section 6 nor to the circumstance that it originated in the letter of President Theodore Roosevelt of June 25, 1906, nor that it had been copied from Section 6 of The Owens River Grant, which was done in the briefs filed after oral argument. Moreover, there was not extended discussion of Section 6 as forbidding sale for resale because the parties were agreed that it was the purpose of the section to and that it did forbid sale for resale.)

The judges had in mind Article XIV, Section 1 of the California Constitution of 1879, which provides that "The use of all water . . . is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law" etc. (The section does not mention electric energy.) The text of Article XIV, Section 1, will be found in the Appendix hereto, page xxxii.

They also had in mind the provisions of Article XI, Sec. 19 of the California Constitution as adopted in 1879, and amended fundamentally in 1911, which were under review in *Russell v. Sebastian*, 233 U.S. 195, and the text whereof appears in Appendix hereto, page xxxiii.

The interpretation of Section 6 suggested by the judges would destroy all effectiveness for Section 6 as a few facts below will show.

In the period 1918-1923, as has already appeared, supra, pages 66, 67, the Municipality sold electric energy from the Early Intake plant to the Sierra and San Francisco Power Company, all within Tuolumne County, California. If Section 6 did not at the time prohibit sale for resale, then the Company became possessed of an unqualified title to the energy sold, and lawfully distributed it outside of San Francisco without any franchise or license from San Francisco; indeed, San Francisco did not have any authority to sell, grant or otherwise confer a franchise on the Sierra and San Francisco Company for operation, distribution, etc., in Tuolumne County.

Moreover, as the Municipality has Hetch Hetchy water and electric energy which it may sell at points along its lines which cross Tuolumne, Mariposa, Stanislaus, San Joaquin and Alameda Counties, California, buyers in those counties and for distribution there would not need any franchise denominated as a "right to sell" emanating from San Francisco and unless the sale of the water or electric energy was restricted so as to forbid the buyer to resell, Section 6 would have no operative effect in the suggested cases.

Again, when the Raker Act was passed in 1913, the Spring Valley Water Company had the constitutional franchise provided in Article XI, Section 19 of the California Constitution of 1879 to distribute water in San Francisco (*Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318 (1915)) which was in perpetuity and could neither be revoked nor impaired by any legislation, constitutional or statutory (*Russell v. Sebastian*, 233 U.S. 195 (1914)); and the Pacific Gas and Electric Company and the Great Western Power Company had franchises under the same constitutional provision to distribute electric energy in San Francisco. See Appendix hereto, page xxxiii, for the text of these constitutional provisions.

It is fair to assume that Congress was alive to the fact that the Spring Valley Water Company had a franchise and that therefore the section would be nugatory if it were merely a prohibition against the granting of a franchise. (The Spring Valley Water Company was mentioned on a number of occasions in the debates which resulted in the Raker Act and it is spoken of in H. Rept. No.

41, 63d C. 1st s. p. 17, from which we quote supra p. 43.)

If following the approval of the Raker Act and water being available, the Municipality had sold all the water to the Spring Valley Water Company and the Spring Valley Water Company had distributed it with its own water, under its own constitutional franchise, could there have been any complaint (if we indulge in the assumption that Section 6 deals only with the grant of franchises)? Clearly not, for, in the events suggested, the City would have sold the water to the Water Company and the Water Company, as owner, would have made distribution under its own constitutional franchise. (In later years the plant of the Spring Valley Water Company was acquired by the Municipality and the distribution of water has been wholly municipal since March 3, 1930.)

Take the present situation: If the contract of July 1, 1925 were treated as a sale, there would be no objection to it as one forbidden by Section 6, if we assume that the section deals only with the grant of franchises. The City does not purport in the contract of July 1, 1925 to confer a franchise on the Pacific Gas and Electric Company; it acted on the basis that the Company had authority to distribute.

It follows, then, that the interpretation of the prohibition of Section 6 as one merely against the granting of a franchise would strip Section 6 of all effective functioning.

(l) Finally, it is clear that no plain and common sense interpretation of Section 6 could ever lead to the contentions made in the Brief for the United States and quoted above; and that these contentions do not overthrow or impair the propositions advanced, supra, i.e., in Points 5 and 6, pages 76, 80, respectively, that it is the purpose of Section 6 to and that it does prohibit sale for resale and that it does not prohibit a contract of agency.

We add there are no remaining arguments in the Brief respecting the interpretation of Section 6, which call for reversal of the decree of the Circuit Court of Appeals.

10. The contract of July 1, 1925 is one of agency and not one of sale for resale.

"On July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project. In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof." (Opinion, C.C.A., R. 665 ft.; 106 F.2d 572, c. 1 ft.)

"The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract was drawn with that purpose and intent. It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale." (Opinion, C.C.A., R. 667 ft.; 106 F.2d 573, c. 1 tp.)

(a) The intention of the parties to make a contract of agency is clearly and unequivocally manifested by the terms of the contract.

The parties to the contract of July 1, 1925 are a Municipality and a utility corporation of California; the contract was made and was to be performed in California. In these circumstances, its interpretation, so we submit, should be controlled by the title on "Interpretation of Contracts" in the Civil Code of California, nine pertinent sections of which are quoted in the Appendix hereto, pp. xvi-xvii. These nine sections are part of the title, comprising twenty-seven sections, i.e., 1635 to 1661, inclusive, which were copied (in 1873) from David Dudley Field's (proposed) New York Civil Code (1865) and may be taken to be rules of interpretation of universal acceptance. It is therefore unimportant whether we quote the rules of interpretation from the statutory law of California or from other authorities of universal acceptance.

"The agreement is just what the parties intended to make it" and "if that intention is clearly and unequivocally manifested, *cadit quaestio*" (Benjamin on Sales, 1st Am. ed. 1875, Section 309), varied in *Hatch v. Oil Co.*, 100 U.S. (10 Otto) 124, 131, lines 15-18, 1879) to say, "The agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances".

In its opinion, the District Court said that "the contract of July 1, 1925 was an attempt to set up an agency agreement which would comply with the terms of section 6 of the Raker Act . . . [and it] became operative, with the parties to it hoping that the arrangement heeded the

admonition against resale of electricity which was set forth in section 6 of the act".[28]

In its opinion, the Circuit Court of Appeals said:[29]

> "The intention of the parties as expressed in the contract of July 1, 1925, was to create an agency agreement. It was the deliberate purpose of the parties to avoid making a sale and to avoid a transaction which could be construed as a sale of electric energy by the City to the Company. The contract was drawn with that purpose and intent."

It is to be noted that the contract is in writing and there can therefore be no dispute about its terms; that there has been no dispute about the meaning and effect of the contract between the parties thereto or between persons claiming under them; that each of the parties understood the contract in the sense in which the other understood it; and that the attempt to construe the contract contrary to what the parties intended is by a third person (the Government).

The determination whether the contract is one of sale or one of agency must start with the question whether it was intended that the Municipality should transfer title to the electric energy to the Company and that the Company should transfer title, as owner, to the consumer, or whether it was intended that the title to the energy should pass directly from the Municipality to the consumer through the instrumentalities of the Company acting as agent of the Municipality. It is to be noted that the con-

[28]R. 95, line 19 to 97, line 5; 23 F. Supp. p. 44, c. 1, line 1 to p. 44, c. 1, line 45.

[29]R. 667, line 26 to 668, line 1; 106 F. 2d 573, c. 1, lines 1-9.

tract uses the word "sold" only twice, i.e., "and meter the energy sold" [to consumers] at the end of paragraph First of the contract (R. 81:11-12) and "sold to consumers" at the end of paragraph Second. (R. 82:4.)

There is no warrant for the claim that the parties intended that there should be a transfer of title to the electric energy from the Municipality to the Company; and the contract is no clearer upon this point than it would have been had there been introduced therein express provisions that (1) The title of the electric energy of the Municipality is not to be transferred by it to the Company; and (2) each sale of electric energy shall be a sale by the Municipality to the consumer and never a sale by the Company to a consumer.

(b) In drafting the agreement the parties were alive to the provisions of Section 6 of the Raker Act and intended to make the contract one of agency which they believed would be valid under the Raker Act, and not one of sale forbidden thereby.

"In entering into this contract, both parties were fully advised of the terms of the Raker Act and the restrictions contained in Section 6 thereof." (Opinion of Circuit Court of Appeals.)[30]

The decision of the Supreme Court of California in *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 205 Pac. 125, was rendered February 25, 1922, more than three years before the execution of the contract of July 1, 1925. The case is described in the opinion of the District Court as one wherein[31]

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[30] R. 666, lines 2-5; 406 F. 2d 572, c. 1 foot.
[31] R. 113, lines 18-29; 23 F. Supp. p. 49, c. 2, lines 19-33.

"a dispute arose over the distribution of electricity owned by the city. The Los Angeles charter forbade the sale of energy to a private company which intended to resell it. The city was transmitting its power over the facilities of two private companies. The agency contract under which the companies were operating was challenged. The question before the court, as in this case, was one of interpretation of an instrument to determine whether it gave rise to an agency or a sale contract. The court ruled that the contract was one of agency and that the city charter was not being violated."

Solicitor Edwards' Opinion, supra, page 67, was rendered June 8, 1923, two full years before the contract of July 1, 1925.

The opinion of Secretary Ickes, August 24, 1935, recognizes that the contract of July 1, 1925 was negotiated, prepared and executed to make a contract of agency, which would be valid under the Raker Act and not to make a contract of sale in violation thereof.[32]

The Secretary said:[33]

"The contract of July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company undoubtedly was drafted and executed with this section in mind [Section 6 of the Raker Act] and in the light of the suggestion contained in the Solicitor's Opinion of June 8, 1923, that a temporary arrangement be made for distributing power through the existing facilities of private concerns."

[32] U.S. Exhibit 11, R. 230-269.
[33] R. 247:13-21.

In its opinion, the District Court said:[34]

"To avoid further[35] violation of the law governing Hetch Hetchy power, S.F. entered into a contract with the P. G. & E. in 1925, whereby arrangements were made for the utility company to distribute the City's energy on its behalf."

(c) There is no ambiguous provision in the contract, but if there were, it would be the duty of the court to interpret it, if possible, to make it lawful and not unlawful, and hence to sustain an interpretation that the contract is one of agency and not one of sale.

The contract is short (less than three thousand words); can be quickly read, and will be found (so we think) not to contain any ambiguous provision.

If there had been any ambiguous provision, it would have been the duty of the Court so to interpret it (if possible) as to make it lawful and not unlawful, in accordance with the rule that an interpretation which makes a contract lawful is to be preferred over one which makes it unlawful. It would, therefore, have been the duty of the Court so to interpret the contract (if possible) as to sustain it as one of agency, and not to destroy it as one of sale.

"An interpretation which gives effect is preferred to one which makes void" (Sec. 3541, Cal. Civil Code, stating the universal rule); and "the principle that where two constructions of a written contract are possible, preference

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[34]R. 95, lines 15-19; 23 F. Supp. p. 43, c. 2, line 47 to p. 44, c. 1, line 1.

[35]This reference is to the sale of the electric energy from Early Intake Power House 1918-1923 by the Municipality to the Sierra and San Francisco Power Company and later to the Pacific Gas and Electric Company, supra, pp. 66-67.

will be given to that which does not result in violation of law." (*Great Northern Ry. Co. v. Delmar Co.*, 283 U.S. 686, 691 top, 1931.)

(d) Not only did the parties have the general purpose to make the contract one of agency but in all of the provisions thereof they manifested this purpose.

It is admitted (either in terms or by clear implication) that, not only did the parties intend as their general purpose to make the contract one of agency and not of sale, but that none of the provisions indicate or can be construed to show that the parties intended to make the contract one of sale and not one of agency. Thus, it is clear that, both as matter of general intent and as matter of specific intent, the parties intended the contract to be one of agency and not one of sale.

> "Throughout this contract the language of consignment is used. . . . true consignment is not a sale; it merely constitutes the consignee an agent of the consignor for a particular purpose—in this case to sell and distribute electric power. If there be a true consignment, the sale to the consumer is directly by the consignor. The consignee has not purchased the commodity himself and then resold it; he has merely negotiated a sale for and on behalf of the consignor." (Secretary Ickes R. 247:21-248:1.)

What is the meaning of this language of Secretary Ickes? It is this: At no time was there a breakdown in language in any of the provisions of the contract which would lead one to suppose that consignment (i.e. agency) was not the objective.

In Brief for the United States (p. 5) it is said that "the contract uses the terminology of consignment".

This being true, we must conclude, and we claim, that there is no provision in the contract which lends any color whatever to the idea that the parties intended to make it a contract of sale.

To like effect, is the statement in the opinion of the District Court, that the contract of 1925 "became operative, with the parties to it hoping that the arrangement heeded the admonition against resale of electricity which was set forth in Section 6 of the Act".[36]

The plain meaning of this quotation, from the opinion of the District Court, is that down to and through the execution of the contract of July 1, 1925, the parties assiduously sought by every provision in the contract to make it a contract of agency, and when they had concluded (in the language of the District Court), they hoped "that the arrangement heeded the admonition against resale of electricity which was set forth in Section 6 of the Act". Therefore, their unaltered purpose was to achieve a lawful contract and not an unlawful one, and every step they took in the drafting of that contract was with a view to make it effective as one of agency and not ineffective as one of sale.

In the opinion of the Circuit Court of Appeals it is said:[37]

> "It is conceded that the terminology used in the contract is that appropriate to an agency and not to a sale."

[36] R. 97, lines 1-5; 23 F. Supp. p. 44, c. 1, lines 40-45.
[37] R. 668, lines 1-3; 106 F. 2d 573, c. 1, lines 9-11.

(e) Inasmuch as it has now been made clear (so we submit) that the parties intended from the beginning to the end to make a contract of agency which would not violate the Raker Act, and were not seeking to make a contract of sale which they knew would be invalid, because in violation of the Act, it is important here to point out that they did not fail of their purpose in the draftsmanship of the contract, and that there is no theory of interpretation which would lead logically to that conclusion.

We have thus far shown that the case does not involve merely a general intent to make an agency contract but that intention was manifested throughout the draftsmanship. It is, therefore, proper to say that the contract is one of agency unless the parties, notwithstanding the foregoing, failed of their purpose, and it is pertinent to make inquiry on this point.

How then did they fail of their purpose? How does it happen that what they intended to be a contract of agency must be declared to be a contract of sale? If parties to a contract wish to make it one of agency and they maintain that unmistakable purpose throughout, they can only fail by obscuring their purpose and belying it by the use of language which makes them appear to be bent upon a sales contract when they are really bent upon an agency contract. If with a settled purpose to make an agency contract, they finally wind up with provisions which are clearly contradictory of that purpose, it might be said that the purpose never existed.

There are no such provisions in the contract. There are no provisions which show that the parties intended something different from what they did intend.

There is one other possibility: Parties having an unmistakable purpose may be thwarted by draftsmanship.

Such a case would arise where persons bent upon a particular intent employed provisions which made a contract such as they intended legally impossible.

In the opinion of the Circuit Court of Appeals, it is said:[38]

> "The intent of the parties to create an agency should be given effect unless they have so bargained that the ownership of the electric energy actually vested in the Company under the contract."

There are no provisions in the contract which make an agency legally impossible.

An illustration of a provision nullifying a purpose (if it can be called such) is this: A, dealing with B in respect of the White farm owned by A, prepares, without the advice of counsel, a document which he calls a lease and in which he recites that for a consideration in hand paid, he grants, bargains and sells the White farm to B, to have and to hold, etc. Here would be presented a case where the parties misused a word; thought the appropriate word for what they intended was "lease" but the substance of what they intended was a conveyance of the fee.

There is no similarity between such a situation and the one which we have here. As we have already said, this contract has less than three thousand words, and (so we claim) it has no ambiguous provision.

There is no provision therein which belies the intention of the parties to make an agency contract, and there is no provision therein which makes an agency legally impossible.

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[38] R. 668:17-21; 106 F. 2d. 573, c. 1, lines 28-32.

In those circumstances, the contract should be given effect according to the intention and draftsmanship of the parties.

(f) The attendant circumstances reenforce the incontrovertible and undisputed fact that the parties throughout their negotiations and in the actual execution of the contract, and in the events which immediately thereafter transpired, manifested their purpose that the contract should be one of agency and lawful under the Raker Act and not one of sale which they knew would be prohibited thereby.

The Raker Act, Section 9, subsection (s), provides that "the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant." (R. 34.)

The Municipality, by ordinance effective January 13, 1914, did "accept the said grant and all the terms and conditions therein contained" and on January 15, 1914, transmitted a copy of the ordinance of acceptance to the Secretary of the Interior.[39]

So much for the terms of the Raker Act and the acceptance thereof by the Municipality.

We have already mentioned the decision in *Los Angeles Gas & Electric Corporation v. City of Los Angeles*, 188 Cal. 307, 205 Pac. 125, decided February 25, 1922, supra, p. 21, and narrated the circumstances which resulted in the Opinion of Solicitor Edwards of the Department of the Interior on June 8, 1923, supra, pp. 64 to 67.

It is indicated in Solicitor Edwards' Opinion that he had been informed that the Municipality's construction

[39] R. 217:22 to 220:22; also R. 5.

work for a very large output of electric energy was nearing completion and he gave consideration to the difficulties which the distribution of, so large a volume at no distant date would or might entail.

All of these occurrences are reviewed in the opinion of the District Court.[40]

We now deal with what followed June 8, 1923.

The record does not contain any evidence of the progress of construction from June 8, 1923, although the early completion of Moccasin Creek Power plant was foreshadowed in the opinion of Solicitor Edwards.

Next came the contract of July 1, 1925.

We have already narrated, supra, pp. 67 to 69, and shall not repeat, the circumstances of the visits and long stay in Washington of representatives of the Municipality seeking the authoritative approval of the Secretary of the Interior to the contract as one of agency and valid under the Raker Act; the rendition of an opinion, not made public until August 24, 1935 of, Acting Solicitor Wright on July 20, 1925, that the contract was one of agency and did not violate the Raker Act (supra, pp. 67-69); the transmission of a copy of that Opinion by the Secretary of the Interior to the Attorney General; the Attorney General's reply; and the final closing letter of Secretary Work to the Mayor of San Francisco, then in Washington, supra, p. 69.

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[40] R. 94, line 23 to 95, line 14; 23 F. Supp. p. 43, c. 2, lines 26-46.

It would be difficult to conceive any line of conduct better calculated to show that the Municipality was bent upon making an agency contract which would be valid under the Raker Act, and not a contract of sale which they knew would be invalid thereunder.

Brief for the United States refers to the Opinion of Acting Solicitor Wright at the end of footnote 4, page 8, and at the end of footnote 8, page 18, and says that therein it is said that "the contract in form was one of sale". Evidently, the word "sale" was inadvertently used instead of "agency" because the Opinion of Acting Solicitor Wright was that the contract was one of agency. Moreover, he did not say that it was "in form" one of agency.

In order that the Court may have the text of his Opinion in convenient form, we print it in the Appendix hereto, pp. xxxiv-xxxix.

Thus, we have seen that, as stated, supra, p. 119, the attendant circumstances leave the fact incontrovertible and undisputed that the parties throughout their negotiations, in the actual execution of the contract, and in the events which transpired immediately thereafter, manifested their intention that the contract should be one of agency and lawful under the Raker Act and not one of sale which would be unlawful under the act.

(g) There is no justification whatever for the position taken in Brief for the United States, page 23, footnote 12, which would deny the applicability here of the rule that the intention of the parties to a contract must be effectuated based upon the false premise that the parties to the contract of July 1, 1925 "use terms to avoid the requirements of the law" and in the preparation of the contract sought evasion and avoidance of Section 6 of the Raker Act.

In footnote 12, page 23, Brief for the Unifed States says:

> "The circuit court of appeals said in its opinion: 'Although the mere terminology used in a contract will not necessarily determine its character, the court should give effect to the express intent of the parties unless the electric energy is actually sold to the Company.' It is no doubt a general principle of law that where no public interest is involved and the parties have a legitimate end in view, their written instruments are to be construed if possible to effectuate their intent. But where, as here, the parties use terms to avoid the requirements of the law, no principle requires a construction favorable to the effectuation of such terms. On the contrary, it is the plain duty of the courts to give full effect to the congressional policy embodied in the legislation sought to be evaded, and the transactions of the parties should be viewed in the light of the statutory purpose rather than from the standpoint of effectuating avoidance of the statute if possible."

The language assumes that it is in violation of law to make an agency contract.

If the law does not forbid an agency the parties were entitled to make an agency contract. It was never suggested prior to the above Brief filed March 8, 1940 and there is no evidence to warrant the idea, that there was

any evasion or unlawful purpose in the execution of the contract. The proper rule here to apply is "the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it". (*Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395 foot, opinion by Mr. Justice Holmes.) This argument of the Government is made, so we submit, to avert consideration of the fact that "the agreement is just what the parties intended to make it" or that "if that intention is clearly and unequivocally manifested, cadit quaestio" (Benjamin on Sales, 1st Am. ed. 1875, Section 309); or that "the principle that where two constructions of a written contract are possible, preference will be given to that which does not result in violation of law." (*Great Northern Ry. Co. v. Delmar Co.*, 283 U.S. 686, 691 top (1931).)

(h) There is nothing in this case to justify the idea that by the contract the parties intended that the Municipality should "for a consideration" grant to the Company or endow it or vest in it a right to sell, nor that the consideration which the Government spells from the contract was intended to be such by either the Company or the Municipality.

The parties to the contract never intended the one to grant nor the other to receive the alleged contract right which the Government is at great pains to build up. It is attempting to put a status and obligations upon the parties which they never intended to assume.

The "consideration" which the Government attributes to the transaction was not given by the Company nor accepted by the Municipality as a consideration for any such "grant", as the Government seeks to deduce from the contract. It is a well-known rule that whatever might

be otherwise called a consideration must be intended to be such in order that it be so held.

"Nothing is consideration that is not regarded as such by both parties." *Philpot v. Gruninger*, 81 U. S. (14 Wall.) 570; *Fire Insurance Association v. Wickham*, 141 U. S. 564; *Wisconsin & Mich. Ry. Co. v. Powers*, 191 U. S. 379; *McGovern v. City of New York*, 234 N. Y. 377; *Allegheny College v. National Chautauqua County Bank*, 246 N. Y. 369; *Kirkpatrick v. Muirhead*, 16 Pa. St. 117.

11. The seven points, 1 to 7 inclusive, upon which the Government rests its argument that the contract of July 1, 1925 is one of sale and, therefore, unlawful, will be found, upon analysis, to be wanting in merit and to afford no justification for even the unsound method of interpretation put forward in the brief.

The seven points, 1 to 7 inclusive, advanced in the Brief for the United States as the bases for the conclusion that the contract of July 1, 1925 is one of sale and, therefore, unlawful, instead of one of agency and valid, are dealt with in the brief at pp. 22-34.

Following the analyses, the brief says (p. 34): "Even if no one of the above factors was sufficient by itself to characterize the contract as one of sale, which proposition is not conceded, it is submitted that the combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale to consumers in violation of the conceded prohibition of the Raker Act".

In other words, although it is not so expressly argued therein, nevertheless the brief carries an implication that if any one of the seven points is found to be good, that upsets the contract. This suggestion is most striking evi-

dence of the fantastic method of approach to the consideration of the contract.

At no place in the consideration and treatment of these seven points is there any real recognition that the intention of the parties should be controlling or be entitled to any consideration.

It will be noted that there is no ambiguity in any of the provisions of the contract, nor that the parties intended (by any of the provisions reviewed in one or another of the seven points) that the title to the electric energy should pass from the Municipality to the Company, nor that they intended to make a contract of sale, nor that they did not intend to make a contract of agency.

These comments (so we think) will be found to be fully justified by the review of the seven points to which we proceed.

The First Point.

The first point of the Government is "The Company does not account for the proceeds of energy sold, but pays a price for energy bought." (p. 24.)

The point begs the whole question. The agreement of the parties was to diametrically opposite effect. They provided for an accounting for the energy in the most practicable way available in the circumstances of the case.

In considering this point, it is to be kept in mind that the energy, as used by the consumers, is different from the energy as received by the Company. In order to be usable, it must be stepped down in voltage and converted in some instances from alternating to direct current. (R. 292, 293.) The energy, therefore, as used by the consum-

ers, has different characteristics from the energy which the Company receives from the City. In view of these facts, the most practical method of accounting that the parties could employ was the one which they did employ, namely, that the Company should account for the energy received by it (and in the form received by it) rather than for the energy sold by it for the account of the City, which had different characteristics.

Moreover, the rate paid by the consumers of the Hetch Hetchy energy, included, among other things, (1) the cost of transmission, distribution and the provision of peak load and standby service and (2) a reasonable return upon the capital employed by the Company in these services. An accounting by the Company for the proceeds of energy sold to the consumers (and in the form in which it was sold) would require more elaborate and intricate bookkeeping than the parties thought necessary or, which was, in fact, necessary. The simplest method of accounting was that whereunder the Company would account for the energy it received at Newark, less transmission losses and with deductions for (a) the cost of transmission, distribution of peak load and standby service and (b) a reasonable return on the Company's capital employed in these services. This was the method of accounting which the parties employed, by the application of the formula expressed in the contract, which reflected the actual experience of the Company in respect of the matters dealt with. (R. 231-236.) To say that the method of accounting employed by the parties (which was the most practicable under the circumstances) converted what, otherwise, would be an agency contract into a sales contract, is to sacrifice substance to

form, to substitute theoretical for practical considerations, and to ignore, entirely, the intention of the parties.

In Secretary Ickes' Opinion it is said (R. 257:10-22):

> "Likewise my conclusion that the transaction is one of sale for the purpose of resale is not varied by the fact that payment to the City and County of San Francisco is, according to the terms of the contract, not at a fixed price but on the basis of determined percentage of a variable retail electric power rate. A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree. Consequently, this type of provision for payment cannot be said to change the transaction from one of sale to one of consignment."

In other words, the Secretary recognized that the proportional basis is prima facie indicative of a contract of agency, but that particular provision did not swerve him from holding that the contract is one of sale for the reason that "a contract of sale may include any terms or any type of terms for payment on which the parties can and do agree". (This should be likewise true in respect of a contract of agency, i.e., that it "may include any terms or any type of terms . . . on which the parties can and do agree".)

The Government says that the parties "never observed" the provisions of the contract for an increase or decrease of the Municipality's returns should there be a change of rates. The facts are these.

Mr. Vincent, called as a witness by the Government, testified (R. 299:2-17):

> "From August 1, 1925 to the end of December, 1937, estimating the three months of the year still to run, the average revenue of our Company from the sale of electric energy sold in San Francisco was 2.381 cents per kilowatt hour as compared with 2.383 cents per kilowatt hour used as the return base in the contract of July 1, 1925. This is a difference of less than one-tenth of one per cent and I would say that over the twelve year period that the contract has been in effect, it would amount to approximately $26,000.00. In stating that figure I mentally estimated that the total amounts paid to the City under the contract have been about $26,000,000, and one-tenth of one per cent is about $26,000."

The first lowering of rates—a lowering which resulted in a decrease in the average revenue per kilowatt hour during the year—was effective in 1935. At the end of the year it appeared that the average revenue per kilowatt hour in that year was 1% below the average of 1924 used in the contract. The fact was thus ascertained several months after Secretary Ickes' Opinion of August 24, 1935 and more than ten years after the execution of the contract. At the end of the year 1936 and when it was more than probable that the Government would shortly bring this action, it was ascertained that the average revenue per kilowatt hour for that year was 6% below the 1924 average, and at the end of the year 1937, which was subsequent to the commencement of this action, it was found that the average revenue per kilowatt hour for the year was 11% below the 1924 average, making an aver-

age drop of 6% for the three years. (Vincent, R. 296: 25-297:5.)

It is impossible to know during a year what average revenue per kilowatt hour for the year will result from changed schedules and it is therefore unavoidable to await the end of the year to know the necessary fact. (Vincent, R. 297:6-31.)

Notwithstanding these reductions, the Company continued to pay the Municipality without making any corresponding reductions in the amounts paid.

It is obvious that if this were a ground for determining that the contract was one of sale it could not have been applied in the first ten years of the life of the contract, i. e., between the execution of the contract on July 1, 1925 and the end of 1935.

Moreover, the bare fact that the Company was paying more to the Municipality than called for by the contract, in the changed circumstances, would not justify a decree enjoining the continued performance of the contract but if it called for any notice at all would call for one commanding the Company not to pay the Municipality any sum greater than that called for by Paragraph Eighth of the contract quoted above.

In point of fact, we submit the point is so attenuated that it neither affected the contract nor called for any action.

Mr. Vincent, testifying (R. 286:9-290:18) respecting Paragraphs Fourth and Eighth of the contract which we quote in appendix pp. vi, viii, suggested that as the contract was a day to day contract, a reduction in the amount

of payment might have involved a demand by the Municipality for a revision of the entire contract, and that by possibility under such a revision the Company might get less and the Municipality more than it had been getting before.

In this connection, Mr. Vincent testified as follows (R. 289:7-15):

> "The contract is subject to cancellation on 24 hours' notice by either party. It is a temporary contract. A contract of that nature is not a permanent contract. If one party wants consideration of one factor favorable to it the other party would certainly want a consideration of the other factors, unless they were bound by those particular factors for a term of years."

Even if Mr. Vincent's testimony were not in the record it could be easily and properly deduced that the Company thought that a change in the amount of return to the Municipality might bring about a reconsideration of the entire subject of revenue leaving the Company no better off than it then was.

Moreover, as stated above, the first falling off which was 1% of the theretofore yearly revenue per kilowatt hour was ascertained for the first time at the close of 1935 after the August 24, 1935 opinion of Secretary Ickes and while this litigation, although not actually commenced, was then in the offing.

The Second Point.

The second point of the Government is "The Company sells Hetch Hetchy energy to the City". (p. 29.)

The Government says that "the Company sells" electric energy "to the City" (p. 29) which "indicate[s] sale rather than agency".

The facts are these:

The contract on behalf of the Municipality was made by the Board of Public Works having lawful authority to deal with the problem. The powers then possessed by the Board of Public Works are now exercised by the Public Utilities Commission and the company deals with the Electric Power Bureau, a department of that Commission. (R. 413-415.)

The energy which is used in various Departments of the Municipality is paid out of separate municipal funds, appertaining to the respective departments which use the energy. For these reasons, the company, as a matter of convenience in accounting (not only as between it and the City, but, also, as among the various City departments which use the energy) bills the City for the energy in separate statements of account addressed to the respective municipal departments which use the energy.

The Municipality has its Moccasin Power House with lines leading therefrom to Newark where a connection is made with the Company's system which leads (say) into the City Hall. The officers and employees of the Municipality in the City Hall throw on or turn the switches, press the buttons or plug the sockets, and have the energy of the Moccasin Power House for instantaneous use. There is nothing said in the contract as to how the electric energy delivered to public buildings, etc., shall be dealt with as a mere matter of bookkeeping, and any rational system can be quickly devised if the one in

use is objectionable. There is nothing in the delivery of energy to Municipal Departments upon which to predicate an argument that the contract was one of sale and not of agency. The practice of billing each of the Departments of the Municipality for the electric energy consumed by it and paying over the amount thereof to the Electric Power Bureau (less the compensation of the Company) was an appropriate way of treating each Department as a separate entity in the matter of the consumption of electric energy.

If the different Departments of the Municipality were not billed for the energy used by them respectively, the Company would account to the Electric Power Bureau for that much less energy, but at the same time present its bill to the Bureau for 73.065% of the amount which would have been charged had the consumption been that of another, as compensation for its services in respect of energy delivered to the Departments of the Municipality. The matter is as broad as it is long.

The Circuit Court of Appeals said (R. 673 foot; 106 F.2d 574, c. 2, ft. 575, c. 1 top):

> "Nor does the fact that the City paid for Hetch Hetchy electric energy delivered to it by separate account at higher rates after it had been stepped down in voltage and converted in frequency, indicate a sale. This was a practical method of balancing the accounts between the parties and of compensating the Company for services performed in changing the character of the electricity and transmitting it to various points of municipal usage."

The Third Point.

The third point of the Government is "The Company fails to segregate revenues derived from Hetch Hetchy energy", which it is argued "further indicates that the Company is a purchaser and reinforces the inference of sale arising from the other provisions" (Br. 30).

There is no provision in the contract which requires or in any way mentions commingling of funds and no provision therein which would justify the commingling, if the commingling made the contract unlawful. In such circumstances, the contract being silent, the Court would not enjoin the continued performance of the contract but would require (assuming such a course to be proper and assuming also that separability of funds was essential to an agency contract), that the funds be kept separate.

The separability of funds is not rendered impossible by any provision of the contract nor by anything inherent in the course of business, and separability could have been easily observed had it been called for or desired.

Under paragraph thirteenth of the contract (Appendix, p. x), the Municipality and the Company may know from day to day and at the close of each day how much is payable in respect of energy delivered on that day, and on the fifteenth day of the following month the amount due in respect of deliveries in the preceding calendar month. No separate bank account was needed in order to sustain the agency and no construction should be allowed which, on that account, would turn a lawful agency contract into an unlawful contract of sale.

It is to be kept in mind that the money collected from the consumer is under the agreement partly the money of

the Municipality, as owner of energy, and partly the money of the Company, as distributing agent, and partly the money of the Company as owner of a portion of the energy. The contract is silent on how the collection should be dealt with. Rent collectors and stockbrokers making collections do not maintain a separate banking account for each buyer or seller. All the transactions pass through the account of the agent. There are decisions which hold that if an agent deposits the funds of his principal in his own account he is liable for the loss thereof, etc., but it has never been thought that an agent who did that was thereby to be turned from an agent into a vendee.

This is another ground of attack made upon the contract by the Government which could be easily remedied as, for instance, by the employment of an account for the collections identified as and called "Collections of Electric Energy paid for by Consumers in San Francisco", or in various ways whereby the point of view of the Government would be fully met.

The District Court said:[11]

> ". . . numerous grain cases . . . stand for the proposition that a mingling of goods is not considered irregular in many agency contracts. . . . Electricity, while different from grain, has been held to be personal property for legal purposes, and subject to the rules governing personal property. (Terrace Water Co. v. San Antonio, etc. Co. (1905) 1 Cal. App. 511, 82 P. 562; Lothrop Theatres Co. v. Edison, etc. Co. (1935), 290 Mass. 189, 195 N.E. 365, 307.)"

[11] R. 117 5-29; 23 F. Supp. p. 50, c. 2, line 26 to p. 51, c. 1, line 8.

The fact that we are here dealing with electric energy and not with wheat or flour does not call for the application of any different rule of law.

There is another aspect of the separability of funds in respect of electric energy which may be appropriately mentioned. It is set forth in the Opinion of Secretary Ickes:[12]

> "The difficulties surrounding the consideration of the present case are greater by reason of the character of the commodity which is the subject matter of the contract. Electric power is not a tangible, material thing. It can be stored only in quantities too small to be of significance in a sale or consignment contract. Because of its characteristics, power alleged to have been consigned by A to B cannot be segregated from other power owned by B; an accounting of the sales of the allegedly consigned power cannot be made by B separate from an accounting of the sales of his own power; the proceeds of the sales of the consigned power cannot be separated from the proceeds of the sales of B's own power; and any unsold surplus of the consigned power, even if it could be segregated, cannot for practical reasons be returned by B to A."

All that is said by Secretary Ickes may be true, but it does not advance the Government's attack on the contract for want of separability of funds. If a Municipality has electric energy inadequate for the requirements of its inhabitants and it chooses an agent for the transmission of its electric energy from the municipal generating station to the ultimate consumer and the agent adds the additional energy needed for the required supply, there is no

[12]R. 251:3-20.

difficulty in arranging proper accounting, and this is all illustrated by the performance of the contract over the years in which it has been carried out.

In the Opinion of the Circuit Court of Appeals it is said (R. 673; 106 F.2d 574, c. 2, lines 32-50):

> "The fact . . . that moneys collected by the Company are not segregated . . . is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for distribution of the electric energy, it was open to them to contract in any manner they could agree upon."

Undue emphasis is given by the Government to commingling of the funds collected from the consumers of the City's energy with its own funds derived from sales of its own energy. So long as the Company accounts regularly to the City for the collections which it makes for the City, on the basis fixed in the contract, the fact that it deposits the moneys collected for the City in the same account with its own funds, certainly can not mark the contract as a sales agreement.

The Fourth Point.

The fourth point of the Government is "The Company names itself as sole creditor in bills to consumers" (Br. 31).

There is nothing in the contract of July 1, 1925, which even mentions billing. The contract therefore cannot be

declared to be invalid because the Company in practice has billed the energy to consumers in its own name and not in the name of the Municipality. If the practice pursued could be interpreted to create a sale which the contract did not create, the injunction granted in the District Court should have been against the practice of billing and not against the performance of the contract. Billing in the name of the Municipality could be easily put into effect.

Billing the customers in the name of the Company is no evidence of an intention on the part of the Municipality or the Company to have title to the municipal energy transferred from the Municipality to the Company either at Newark or at all. Throughout the country and in San Francisco, brokers and agents, rent collectors, and the like, issue due bills and receipts in their own name and not in the name of the principal, sometimes using the word "agent" and sometimes not using it. This practice, almost universal, has never been thought to transform a relationship of principal and agent into one of vendor and vendee.

The Opinion of the Circuit Court of Appeals said (R. 673; 106 F.2d 574, c. 2, lines 32-50):

> "The fact .... that the Company is the sole creditor named in the statements of account . . . is of little importance as showing a sale under the circumstances of this case. Here a public utility corporation is one of the contracting parties and a city the other. A practical method was adopted in arriving at its compensation to be paid for transmission and for the use of the Company's facilities. Assuming that the parties could make an agency agreement for

distribution of the electric energy, it was open to them to contract in any manner they could agree upon."

The contract does not require the Company to make a reference to the agency in the bills issued to the customers for energy, and, evidently, the parties, through the course of years, have not found the insertion of such a reference of any consequence either way, otherwise one or the other would have insisted thereon.

The inhabitants of the City may be supposed to have known that they were getting electric energy generated by the City, and that the bills were in accordance with an arrangement between the City and the Company, which had as much publicity as any arrangement could possibly have. Moreover, if the public did not know it, the contract was still an agency. We have innumerable instances in the law that an agent acts for an undisclosed principal, although he may hold himself out as acting on his own account. The farmer may consign the products of his farm to his broker to be sold. The broker finds the customer who buys the products. The broker bills the customer in his (the broker's) name, and the customer does not know who is the producer, nor does he care. This fact does not make the broker the purchaser from the producer. There would not be the slightest difficulty in having the billheads of the Company carry the information that it is acting as the City's agent with respect to the Hetch Hetchy electric energy; and this inconsequential change would dispose of the Government's argument that the billheads do not show the City as principal in the sale of the energy.

In the present case, the Company, if it so wished, might have advised its customers in billing them that it was selling a part of the energy consumed by them as agent for the City. The fact that it did not do so, is not a matter which would make or break the contract as an agency contract. It was a matter of such little consequence that the parties failed to cover it in the contract.

The Fifth Point.

The fifth point of the Government is "The Company is not subject to the City's direction in the fixing of rates to consumers" (Br. 31).

The argument of the Government on this point is twofold; (a) that the Company was authorized, at its discretion, to charge less than the rates prescribed by the Railroad Commission; and (b) that the City "abdicated its otherwise unfettered power" to fix its own rates "without regard to those established by the State Railroad Commission".

The first paragraph of the contract (R. 81, Appendix, p. iv) provides that the Company shall "collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates".

Section 23 of Article XII of the California Constitution provides that every "private corporation" furnishing heat, light, water or power is subject to control and regulation by the Railroad Commission. It has been held that the term "private corporation" does not include a Municipality and, therefore, that the Commission has no jurisdiction to prescribe rates for utilities conducted by Municipalities. (*City of Pasadena v. Railroad Commission*, 183 Cal. 526 (1920).)

It is, likewise, true that under the "Public Utilities Act" of California (Stats. 1915, pp. 115, 123) utilities subject to the jurisdiction of the Commission are required to file their rate schedules with the Commission and the Commission has power to determine and prescribe the rates, and the rates so prescribed cannot be changed except on order of the Commission made and entered after a hearing.

No utility subject to the Railroad Commission can sell its own energy except at the lawfully established rate and there can be no other. (*Sierra etc. Co. v. Universal Elec. Co.*, 197 Cal. 376, 382, syl. 4 (1925); *T. R. Miller Mill Co. v. Louisville etc. Co.*, 207 Ala. 253, 92 So. 797, 799, c. 2 ft., 800, c. 2 tp., 801, c. 1 ft.; syl. 3, 5 (1921-1922); *In re Independent Sewer Pipe Co.* (D. C. Cal. 1918), 248 Fed. 547, 550, syl. 1; *Louisville Co. v. Maxwell*, 237 U. S. 94, 98 (1915); *Kansas City Co. v. Carl*, 227 U. S. 639, 653 (1913); *Payne v. Clarke* (D. C. Cal. 1921), 271 Fed. 525, 526.

It is not argued that the price is fixed by the Company but it is said that the Company might fix rates below those lawfully established. This we have shown to be erroneous; but even if it were true, that circumstance would cut no figure in the case and the contract would still be one of agency.

It is not disputed that in the contract the Municipality adopted as the rates to be charged for its own electric energy those prescribed by law to be charged to the inhabitants of San Francisco for electric energy owned by the Company.

The argument is that the Municipality is not subject to commission regulation and could therefore sell its electric

energy to consumers in San Francisco at whatever price it pleased, and the fact that the City does not set its rates is "indicative of a sale" (Br. 32, l. 6).

Although the Government says that "the City abdicated its otherwise unfettered power under the state constitution to fix the rates" (p. 32), it does not argue that there is any objection to the Municipality adopting as reasonable rates to be charged for its own electric energy the rates prescribed by the Railroad Commission to be charged by the Company, but the fact that it does so is declared to be "indicative of a sale" (Br. 32, l. 6).

It is quite reasonable, so we submit, for a Municipality, as a matter of public policy, not to charge higher rates for the electric energy generated by it than the rates prescribed by the Railroad Commission for privately owned utilities.

The Municipality specified that the charges for its energy so to be sold should "not exceed the lawfully established rates" for such energy in San Francisco, knowing that its agent to distribute its energy was a public utility subject to the regulation of the Railroad Commission. The fact that it was exempted from such regulation did not forbid it to adopt as its own rates lawfully existing rates applicable to a private utility as the price which should be paid by its own inhabitants for the municipal energy.

It would have been possible for the Municipality and the Company to make an agreement into which there could have been copied the schedule of the Railroad Commission in force in 1924 without mentioning the Railroad Commission. Would not such a provision meet the argument of the Government, and if so, does not that show

that the point with which we are dealing is wanting in merit? Furthermore, the Municipality does no more in referring the rates for its energy to the Railroad Commission than a farmer does when he authorizes his broker to sell in Chicago or New York "at market".

What we have said above is reinforced by Paragraph Eighth of the contract (R. 85, Appendix, p. viii) which deals with the contingency that "the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority."

The Circuit Court of Appeals said (R. 672; 106 F.2d 574, c. 1 foot):

> "The contention is that the contract between the City and the Company does not fix the rates to be charged to the consumer, that the City had power to fix such rates as to electric energy owned and distributed by it and that the fact that the power to fix the rates was conferred upon the Company by the City indicates a sale of electric energy to the Company. In support of this contention it is claimed that the provision in the contract that the rates should not exceed the maximum rates fixed by law, that is, by the Railroad Commission, allowed the Company to charge any rates less than the maximum thus prescribed and therefore permitted the Company to exercise a right of ownership of the electric energy delivered to it by the City. The Company has charged the rates fixed by the Railroad Commission and the conduct of the parties and the eighth covenant of the contract providing for a change of the Company's compensation in the event of a change in rates indicate that it was the intent of the parties that these maximum rates should be charged to the consumers until changed by competent authority. There is no

> delegation by the City in the contract to the Company of any power to fix the rates to the consumer and if the City had the power to fix the rates by reason of its ownership it still retains that power unless it be assumed that the contract is one of sale instead of agency, which is the very point in dispute."

We wish to emphasize that there is nothing to show that the Company ever attempted to fix a price below the lawfully established rates or that there was at any time a lawfully established rate which the Company could vary either by increasing it or lowering it.

Furthermore, there is a very practical consideration which required the fixing of rates respecting the City's energy to be made just as they are made, i. e., by the Railroad Commission. The City's energy after being stepped down in voltage and converted in part to direct current by the Company (as it must be before becoming usable) is not different from the Company's energy. There could not be two rates charged to San Francisco consumers for simultaneous delivery of the City's energy and the Company's energy used to supplement the City's energy. In view of the fact that the Railroad Commission under the Constitution and laws of California was required to fix the rates for the Company energy, practical considerations prompted the City to agree that the rates fixed for Company energy should be the rates paid for municipal energy.

The Sixth Point.

The sixth point of the Government is "The Company has complete control of the energy" (Br. 32).

The Opinion of the Circuit Court of Appeals says (R. 670, 106 F.2d 573, c. 2, lines 33-54):

> "To say that the Company has exclusive control over the energy once it enters its system at Newark is to overlook the factual situation in regard to the transaction. What loss of control amounts to in this case is merely that the City delivers the electric energy to lines of the Company at Newark. Generation and consumption of the electric energy are simultaneous. The City generates the power and controls the power plant. The ultimate consumer obtains the electric energy by turning his switch, plugging his socket, or pushing a button, etc. Thus, to compare the control of the electric energy by the Company during the time of its transmission (about 1/4650 of a second) with the control of an agent or wholesaler of ordinary merchandise is to overlook what actually takes place in the transmission of the energy. The only control of the Company is that it controls its distribution facilities."

The Government gives exaggerated emphasis to the control of the load dispatcher of the Company. (R. 283.) The function of a load dispatcher is to indicate in advance to the generating plants what amount of energy they may reasonably expect to be called upon to furnish. In the exercise of his discretion, when he has many plants owned by his Company, he increases or decreases the requirement from one or another. The amount of power that comes from Moccasin to Newark "is governed by our load dispatcher within the limitations of the contract"

(Vincent, R. 285, lines 11-12); and the load dispatcher "has not entire freedom" for "he is limited by . . . contractual obligations" (Vincent, R. 303, lines 8-10). In the case of the Moccasin power, therefore, he has no discretion at all, because the output of the Moccasin plant is inadequate for the municipal requirements, and, as the Company is required by the contract to pay for that amount if it does not take that amount, it necessarily calls for and accepts all the energy specified in the contract and gives priority to that energy over any energy from the Company's own or from other sources. Of course, it advises the Moccasin plant of the varying demands through a day, but that does not alter the priority which the Moccasin plant receives.

Speaking to a related point, the Opinion of the Circuit Court of Appeals says (R. 671; 106 F.2d 574, c. 1, lines 35-48):

> "One of the points mainly relied upon by the United States as showing a sale is the fact that the City is assured of payment and the obligation of the Company to pay for the electric energy delivered at Newark is unconditional. But in view of the circumstances of this case, where the amount of electric energy supplied did not fill the requirements of the Company, this provision merely amounts to an agreement by the Company to dispose of the City's electric energy ahead of its own and a guarantee of disposition of all energy supplied under the contract."

The point under consideration does not arise out of any specific provision of the contract because there is no specific provision dealing with "control". The only loss of control by the Municipality (whatever that loss of con-

trol may be) arises from and is referable solely to the fact that the Municipality delivers its electric energy to the Company at Newark. All loss of "control" arises from that simple fact, and to say that delivery of the energy by the Municipality to the Company involved a loss of "control" which made the contract one of sale amounts to a contention that there cannot be an agency contract inasmuch as there must be a delivery of the electric energy whether the deliveree be treated as agent or buyer.

This argument would nullify the suggestion contained in the opinion of Solicitor Edwards of June 8, 1923, that a lawful arrangement could be made for delivery of energy by the Municipality to the owner of a distributing system for transmission over its lines for the account of the Municipality and as the latter's agent.

The argument ignores the fact that the generation and consumption (or consumption and generation) of electric energy are practically simultaneous; that it cannot be said that one precedes the other by a moment of time during which any control could be exercised; and that the ultimate consumer causes the generation of the energy by throwing or turning on his switch or plugging his socket, or pressing his button, etc., all of which has been fully set forth, supra, pp. 82, 144.

Underlying the argument here under review is the erroneous idea that delivery of electric energy is or might be comparable to the shipment of a carload of celery, say, from Stockton to New York for sale by the consignor's broker "at market", or a shipment of livestock from, say, Bakersfield to Chicago for sale by the

consignor's livestock broker there "at market". In either event, the shipper could stop the shipment or divert it to another point while in transit. Such transactions are not comparable to deliveries of electric energy and the ideas which arise out of them (seemingly underlying the argument of the Government) have nothing to do (so we submit) with the case with which we are presently dealing.

The following authorities dealing with agency in the case of commingled goods are helpful to a conclusion respecting the point now in hand.

In *Dryden v. Michigan State Industries*, 66 Fed. (2d) 950 (CCA. 8, 1933), the Court held that the contract there reviewed was a *consignment* contract and not a *sales* contract, despite the fact that there had been a commingling of the goods of the consignor with like goods of other persons.

In *In re Klein*, 3 Fed. (2d) 375 (CCA. 2, 1924), the Court held that goods sought to be recovered by the petitioner had been *consigned* to a bankrupt and *not* sold to him. In this connection, the Court said (p. 379, c. 1):

> ". . . The goods might have been mingled with others the last days of the bankrupt's business or by employees of the receiver. The failure to place them in a separate location in the store, of itself, would not defeat the petitioners' claims."

To the same effect, see *McCallum v. Bray Robinson Clothing Co.*, 24 Fed. (2d) 35 (CCA. 6, 1928), and particularly paragraphs 4-6 at page 37, c. 2.

In *Colorado-New Mexico Wool Marketing Assn. v. Manning*, 96 Colo. 86, 40 Pac. (2d) 972 (1935), it was held that a contract of a wool grower with a wool marketing association was one of *agency* or *consignment* and not of *sale*, notwithstanding that the contract provided, as stated in the opinion, as follows (p. 973, c. 2):

> ". . . the grower agrees that the association may sell the wool delivered to it, may borrow money on it, may commingle it with other wool, and may exercise all other rights of ownership over it."

In *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022 (1898), the Court held that one may be an agent to introduce certain manufacturers' goods, though he sells them to customers of his own.

First National Bank v. Kilbourne, 127 Ill. 573, 20 N. E. 681 (1889), involved a contract under which various dairymen furnished Kilbourne with dairy products to be manufactured by him into butter and cheese and sold by him in the course of his business as a dairy produce dealer. The Court held the contract to be one of *agency for sale* and *not* a *contract of sale*.

See also

Walther v. Williams Mercantile Co., 169 Fed. 270, 273 (CCA. 6, 1909);

1 *Mechem on Sales* 27, Sec. 25.

See, also, reference to opinion of the District Court respecting grain cases which dealt with the mingling of goods, *supra*, p. 134.

As we have already said, there is no provision in the contract which deals with "control", and if this be an omission, an appropriate provision will be supplied by the law; and we submit that what is supplied by the law cannot be unlawful. Moreover, the Municipality retains control for the reason, among others, that by the contract of agency, the Municipality specifies what the Company is to do.

If there were any particular kind of control necessary to this agency contract (which we submit there is not) the law, covering an uncovered matter, will do the needful and do it lawfully.

The Company does not control the output of the Municipality's plant. The Municipality, through its contract, controls the acts of its agent, and the consumers determine the volume of demand for the Municipal energy.

Even if the contract of July 1, 1925 purported to grant control over the energy to the agent (which it does not) this fact would not convert the contract into one of sale.

In "Restatement of Agency", Vol. 1, § 14, sub. (b), it is said (p. 48) that a person may contract with an agent "not to exercise control." One of the chief distinctions between an agent and a servant is that the agent, ordinarily, enjoys freedom from control, in respect of the manner in which he carries out the business of his principal, whereas the servant is usually restricted in the manner of his operations. It is to be observed that much of the confusion in the Government's argument results from applying to the relation of principal and agent the rules that apply to the relation of master and servant.

It is well recognized that an agent authorized to effect sales on behalf of its principal may fix the price, terms and conditions of sale (2 Am. Jur., p. 98, "Agency", § 120; Mechem on Agency, § 854; Mechem on Agency, § 2503 (referring to factors); 2 Cor. Jur. Secundum, p. 1319, "Agency", § 114 (bb); 2 Cor. Jur. Secundum, p. 1321, "Agency", § 114 (ee)) and that an agent is frequently authorized to "select the purchaser" and fix the "time and place of delivery".

Mechem on Agency, § 854;

2 *Cor. Jur. Secundum*, p. 1322, "Agency", § 114 (ff.).

In 2 Am. Jur., p. 98, "Agency", § 120, it is stated that an agent with general authority to effect sales is deemed to have ostensible authority "to fix the terms of sale, including the time, place, mode of delivery, and the price of the goods, and the time and mode of payment".

Many instances might be adduced to illustrate the distinction between an agent and a servant, and, thus, to make apparent the underlying fallacy in the Government's argument as applied to the contract here in issue, but we believe that those already given are sufficient for the purpose.

It is physically possible, of course, for the Company to refuse acceptance of Municipal energy at Newark, but that would not be in furtherance of but in violation of the contract.

The Seventh Point.

The seventh point of the Government is "The Company bears the risk of loss". (Br. p. 33.)

Upon this point it is said that "It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention." (Br. p. 33.) The risk of loss, of which the Government speaks, is said to arise from the absence of a provision in the contract for "deduction for the actual physical loss which might arise from fortuitous causes, such as accident or theft." (Br. p. 34, ftn. 19.)

There is no provision upon this subject in the contract, and the argument of the Government is that the failure to provide against these nebular and remote losses, makes the contract one of sale and not one of agency, although we have shown, abundantly, that the intention of the parties was that it should be one of agency.

Furthermore, *Donlan v. Turner, etc. Co.* (CCA 9, 1922), 282 Fed. 421, dealing with the general rule that loss follows title said (p. 424): "But the rule is not without exceptions, for not infrequently are valid agreements made where the property is in one and the risk in another", which is conceded by the government (Br. 33, lines 16-17).

We submit that the possibility that the Company may at some distant date suffer some physical loss through "accident or theft" which has not happened in the past fifteen years would be insufficient to establish that a contract intended to be one of agency was one of sale.

Some Additional Points.

The Government in a casual way, or by suggestion or innuendo, brings into the case certain additional objections to the contract which we briefly review.

(a) If the delivery be a "consignment" at Newark, it may nevertheless be a "sale" at the consumer's switch. This point, which is not a new one in the case, is made in footnote 14, p. 27 Br. U.S.

The answer is that the matter is governed by the intention of the parties. As there was no intention to transfer the title at the consumer's switch the title was not transferred.

(b) By innuendo, the Government attacks the contract on the ground that the sale of municipal energy was to those who before that time had been customers of the Company. (Br. 31, ls. 4-8.)

This in fact is not a point but it is a parenthetical innuendo. It may be briefly answered:

If there be a single utility, publicly or privately owned, furnishing all the electric energy consumed by a municipality and its inhabitants, cases like those cited by the Government below that "disposal of goods to regular customers in the usual course of trade indicates a sale" afford no analogy. "Regular customers" is not a term suitable for use when applied to a public utility which is supplying all the electric energy used by a municipality and all its inhabitants.

As indicated, there are decisions wherein (while casting about to find whether a contract the nature of which is in dispute between the parties thereto) it is said that if the ultimate consumers were the regular customers of the

person who was agent or vendee, as the case might be, that was a circumstance having tendency to indicate a sale. The cases considering the commodities dealt with therein, however, afford no analogy to electric energy, particularly in the circumstances here; and there are authorities to contrary effect.

In *Lambeth Rope Co. v. Brigham*, 170 Mass. 518, 49 N. E. 1022 (1898), the Court held that one may be an agent to introduce certain manufacturers' goods, though he sells them to customers of his own.

In *First National Bank v. Kilbourne*, 127 Ill. 573, 20 N. E. 681 (1889), involving a contract under which various dairymen furnished Kilbourne with dairy products to be manufactured by him into butter and cheese and sold by him in the course of his business as a dairy produce dealer, the Court held the contract to be one of agency for sale and not a contract of sale.

See also *Walther v. Williams Mercantile Co.*, 169 Fed. 270, 273 (CCA 6, 1909).

The consumers of the electricity were all of the inhabitants of San Francisco. The Company, as owner, had theretofore sold its electricity to them. When the Municipality wished to distribute its energy to the inhabitants of San Francisco, the Company agreed to act as distributor and in the capacity of an agent. The fact that the Company delivered the municipal energy to the persons for whom the Municipality designed it is no evidence of a sale even if before that time the Company had been selling its own energy to those self same persons.

Disposal of goods by an agent to his own customers in the usual course of trade does not indicate that the agent

has title to the goods, or that he is selling for his own account, and not for the account of a principal.

(c) The Government dwells upon the provision in the contract whereby the Company is required to pay for all of the energy up to a 75% load factor even if it does not accept the energy at Newark (Br. p. 5 middle and fn. 1; p. 6 top, p. 7 middle).

At the outset it is to be noted that the municipal electric energy has never been equal to the requirements of the inhabitants of San Francisco, so that the Company has never been called upon to pay for electric energy beyond its needs and the point is purely academic.

> "As a practical matter, S. F. has been able to utilize the full capacity of Hetch Hetchy power even during off-peak periods. Thus the Company has not been forced to pay for electricity which it has neither accepted nor sold. The written contract is inconsistent with an agency agreement, but the fulfillment of its duty-to-pay provision is not. As carried out, the 75% load factor term has meant that preference is given to Hetch Hetchy energy by the Company, when consumer demand is low." (Opinion of District Court, R. 115, fn. 13; 23 F. Supp. p. 50, c. 2, fn. 13.)

The inadequacy of the City energy for the San Francisco load and the amounts by which it falls short appear infra, p. 165. The engagement on the part of the Company may be treated either (a) as a guarantee to dispose of a definite output; or (b) as imposing a duty upon it to dispose of the energy of its principal before disposing of its own. Upon the latter point, see Opinion of Circuit Court of Appeals quoted supra, p. 145.

The obligation to pay, if delivery is not accepted cannot be treated as an indication of a sale because if the consumers do not require the energy, it cannot be generated and delivered to the Company at Newark, and the idea of a sale of energy not generated involves a contradiction in terms.

Parties to a contract of agency may agree upon any lawful terms, and an agent might well guarantee to find a market and consumers for the product of his principal without becoming himself a purchaser from the principal.

> "The P. G. & E. has a duty to pay S. F. for electricity available at Newark, on the basis of a 75% load factor. That duty might not be fatal to an agency contract; . . . In a normal agency, the agent effects a transfer and is not responsible for payment unless the commodity is actually delivered to him and sold by him." (Opinion of District Court, R. 114:25-115:4; 23 F. Supp. p. 50, c. 1, lines 7-17.)

> "Buyer and seller are always free to provide by express agreement how, when and by whom, the risk of loss is to be borne. . . . A contract of sale may include any terms or any type of terms for payment on which the parties can and do agree." (Secretary Ickes' Opinion, R. 256, lines 26-28; 257, lines 16-19.)

This is equally true of principal and agent and of contracts of agency.

If therefore the Company was willing to incur the risk of assuming that it would be able to market the entire output of the Municipality "on the basis of a 75% load factor", it was at liberty to agree that it would do so. Such an agreement, borrowing the language of the opinion of the district court, might not be fatal to an agency

contract", to which we should care to add "would not be fatal to an agency contract."

This answers the suggestion that (a) the Company is bound to pay for all energy delivered to it by the Municipality whether or not it is taken by consumers; and (b) has assumed in addition an obligation to pay for all energy offered to it even though not accepted by it.

(d) It was argued by the Government below (and the District Court mentioned the argument) that the fact that the accounting is limited to monthly statements by the City to the Company for electricity delivered at Newark is indicative of a contract of sale.

The point thus taken is that the contract is one of sale because when the day of monthly payment arrives, or shortly in advance thereof, the Municipality sends the Company a debit tag showing the amount payable by the Company to it, whereas in cases of agency (so the Government in effect argues), the agent sends the principal a credit tag. This (we submit) is a very thin point. The employees of the Municipality's electric system have the means at hand of knowing at the close of each day what will be payable to the Municipality on the fifteenth day of the following month in respect of that day's delivery, and the fact that a debit tag is sent by the Municipality rather than a credit tag by the Company is hardly to be taken into account. There is nothing in the contract which provides for this method of doing business and if the practice put in doubt the fact that we have here an agency contract, the practice can be quickly changed. Instead of a debit tag sent to the Company, a credit tag can be sent to the Municipality.

In connection with this point, it is to be kept in mind that the contract entitles both the Company and the City to read the meters at Newark daily so that both may be apprised of the amount of energy delivered from day to day and, thus, have an accurate basis of accounting. Under these circumstances, it is clearly immaterial who furnishes the statement of the amount of energy delivered by the City to the Company.

(e) There is one other matter which may or may not be intended as a criticism of the contract. Against the possibility that the suggestion with which we deal is intended as a criticism, we give brief explanation in respect thereof.

In footnote 1, page 5 of Brief for the United States, after pointing out that "load factor" is the ratio between the average actual load, and the maximum load capacity of a plant, it is said that the provision in the contract of July 1, 1925 that the output of Moccasin plant to be delivered to the Company on a 75% monthly load factor, means that "if the maximum monthly production capacity of the Moccasin plant were 100,000 kilowatts, the Company would be required to accept or pay for not more than 75,000 kilowatts per month". Thus, the idea may be conveyed (whether so intended or not) that the contract requires (or permits) a limitation of output or wastage of 25% of the total production of which the Moccasin plant is capable. This is the first time that such a suggestion has arisen. There is nothing in the record to show why or at whose request the provision was inserted in the contract for the delivery of electric energy "at not to exceed a 75% monthly load factor". It may well have been intro-

duced at the instance of the Municipality because of the limitations of its plant.

In a hydro electric plant (such as the Moccasin plant) the amount of water available and the generating machinery will determine the output of the plant. When a 75% load factor is spoken of, we mean that the amount of water available or other limitations of the plant will not permit of a generation of electricity to maximum capacity for more than three-fourths of the time. This is what is meant in the contract of July 1, 1925. The contract requires the City to deliver and the Company to accept "the entire energy output" of the Moccasin plant (R. 80, 81). The provision limiting delivery "at not to exceed a 75% monthly load factor" is simply a recognition of the physical limitations on the City's plant which prevent it from maintaining a maximum production for more than seventy-five per cent of the time.

Thus we bring to an end the review of the argument of the Government in the seven objections to the contract in terms made, and four more resting in suggestion and innuendo.

We submit that there is no justification for the argument of the Government that the contract of July 1, 1925 was a contract of sale and not one of agency, because or on account of any one of the eleven points, or all of them en bloc.

In closing the analyses, we wish again to point out that the Government in reviewing the contract is not seeking

the intention of the parties, but in fact, wholly disregards it.

In no instance has the Government considered any of the points with a view to reaching a conclusion as to what the parties intended thereby nor how the pertinent provision should be interpreted considering its environment. The whole purpose of the Government's argument, so we submit, is to ascertain whether particular provisions of this contract are frequently found in sales contracts, and if so, to argue that this contract is one of sale, although intended to be otherwise—an intention shown aliunde and by the language of the agreement.

Moreover, the Government in its argument does not seek to treat the contract as a whole nor weigh nor balance all of its provisions; nor give any heed to those of them which were introduced into the contract to effectuate and further the purpose of an agency.

It would seem, so we submit, that this manner of treating a contract is without parallel.

12. **The so-called findings of fact respecting the interpretation and meaning of the contract are not to be regarded as findings at all, considering (a) that questions respecting the construction of a contract are questions of law and not of fact, and (b) that the contract is plain and unambiguous and (as the Government conceded below) has been fully performed in all particulars, except one which arose ten years after the execution of the contract, and in respect of which the Government contends that the Company should in the years 1935, 1936 and 1937 have accounted to the Municipality for smaller sums than it actually accounted for in those years. Furthermore, there was no evidence extrinsic to the contract which in any manner varied the terms thereof, and hence any finding in conflict with the plain terms and legal effect of the contract is unsupported by the evidence and should be rejected, quite apart from the fact that the case being one in equity, the findings are at large in this Court.**

We submit that the contract in its entirety is plain and unambiguous.

The Government conceded below that the contract had been fully performed with the exception that the Company did not follow reductions in rates by reductions in the amounts accounted for to the Municipality in the years 1935, 1936, and 1937. In Brief for Appellee, C.C.A., March 10, 1939, page 14, it is said "With this exception, the contract has been enforced (R. 289)".

At the conclusion of the Opinion of the District Court, filed April 11, 1938 it was said: "This opinion may stand in lieu of the written findings of fact and conclusions of law." (R. 125.)

However, counsel for the United States proposed independent "Findings of Fact and Conclusions of Law",

May 18, 1938. (R. 125-136.) The Municipality proposed amendments June 1, 1938. (R. 137-157.) The District Court signed the Findings as proposed by the Government, apart from slight and inconsequential changes, June 24, 1938. (R. 157-167.)

The Municipality took proper exceptions to the findings in the opinion and to the independent findings as filed and made the same the basis of assignments of error properly reserved. If the opinion be regarded simply as an opinion, the exceptions thereto and assignments of error will be disregarded; however, the exceptions and assignments of error are in order on either hypothesis.

The so-called findings are on matters of law and should be disregarded as findings of fact, and, moreover, there is no evidence to sustain them in the instances where the interpretation of the contract departs from the lawful interpretation. Furthermore, if they properly interpret the contract, they contribute nothing to the case, and if they misinterpret the contract, they are nugatory. There is no evidence in the case apart from the contract itself upon which to predicate any interpretation of it different from the interpretation which, as matter of law, would be affixed to it.

As this is an equity case, it is to be here heard and determined as a case de novo; this Court is not concluded by any finding of the trial Court, however much it may defer to the latter in respect of matters which are strictly findings of fact and have substantial evidence to support them. *Waterloo Mining Co. v. Doe* (CCA. 9), 82 Fed. 45; *Presidio Mining Co. v. Overton* (CCA. 9), 270 Fed. 388, 390; *Mt. Vernon Refrigerating Co. v. Fred W.*

Wolf Co. (CCA. 6), 188 Fed. 164, 168; *Erhard v. Boone State Bank* (CCA. 8), 65 Fed.2d 48, 50; *O'Brien's Manual of Federal Appellate Procedure*, p. 57. The construction of the contract is a matter of law for the Court because there are no disputed questions of fact, and if there were, the construction would be still one for the Court in the light of the conclusions reached in respect of the disputed facts. *California W. D. Co. v. California M. O. Co.*, 178 Cal. 337, 341, lines 25-28; *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18-21, par. 4.

In an annotation entitled "Province of Court and Jury respectively as to construction of written contract where extrinsic evidence as to intention has been introduced", 65 A. L. R. 648, 650, the latter of the above two cases is quoted with fullness, followed by an assemblage of cases throughout the country to like effect.

So are the following:

"Where a contract is in writing, the determination of the legal effect of the writing or the facts in creating an agency or sale is for the court." (Syl.)

"The question for decision is: Is the agreement a contract of sale, or is it a contract of agency? It is well settled that, where the contract is in writing, the determination of the legal effect of the writing, or the facts in creating agency or sale is a matter for the court. Mechem on Agency (2d Ed.), § 50." (*Coles v. Somerville*, 47 Nev. 306, 310, 220 Pac. 550, 551 foot [1923].)

"Where the contract is in writing or the facts are not disputed, the question whether the writing produced or the facts admitted operate to create a sale

or an agency to sell is one of law to be decided by the court." (1 *Mechem on Sales*, § 50, p. 62.)

"'What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract * * * They [the court] give to the jury, as a matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take.'" (*Graham v. Sadlier*, 165 Ill. 95, 97, 46 N. E. 221, 222.)

See, also: *Equitable Life Assur. Soc. of the United States v. Wells*, 101 Fed.2d 608; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291; *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 397.

13. There is a clear and fundamental fallacy (so we submit) in the method which the brief employs in the interpretation of the contract to its destruction, by casting it, by construction, into a category which the Government argues makes it illegal whereas, if it were permitted to remain in the category in which the parties intended it to be, it would be effective and lawful.

The brief practically takes no notice of the importance of intention in the construction of a contract. The "intent" of the contracting parties is mentioned in the brief only twice; first, in footnote 12, page 23 of the brief which we have quoted at length and discussed, supra, p. 122; and second, in the sentence, "It is well recognized by the cases that the risk of loss accompanies title to the goods in the absence of a contrary expressed intention". (p. 33, lines 14-17.)

The Government seems to have assembled all available cases which involved dispute as to whether a transaction was a consignment or a sale and whenever it found, in one of those cases, an element present or which it regarded to be present, in the contract of July 1, 1925, it seized upon that element as an argument that the contract is one of sale.

This explains why the Brief does not deal with "intent" and "intention" and uses phrases such as these: A feature of the contract "indicates" or is "indicative" of a sale (p. 24, line 4; p. 25, line 18; p. 29, lines 5-6; p. 30, line 20; p. 32, line 6; p. 33, line 1); or justifies the "inference of sale" (p. 30, line 21); or is "ordinarily considered an earmark of sale" (p. 31, lines 11-12); or that "the transaction is normally one of sale" (p. 31, line 19); or a "combination of so many factors pointing in the same direction compels the conclusion that the City is selling its energy to the Company for resale". (p. 34, lines 7-10.)

The arguments in the brief are in hostility to true construction and to established rules which require the Court to arrive at the intention of the parties and to give it effect if it be consistent with the language which they have employed.

At no time does the brief suggest the idea that the provisions which it instances are legally irreconcilable with a contract of agency. It contents itself, for the most part, with phrases like those above quoted and these in addition: "characteristics of the arrangement furnish the strongest evidence" of sale (p. 11, lines 23-25); a named "factor is virtually conclusive" of sale. (p. 25, line 7.)

At no point in the brief is it indicated that there is any reason why a contract of agency may not borrow provisions frequently employed in sales contracts without making the parties pay the penalty of having the contract nullified and destroyed.

There is no indication what relative importance is attached to particular provisions and no means whereby to know except the weak implication in Brief for United States supra p. 124, which of these points could be wanting in merit and the Government still maintain its argument. Would the argument still be made that the contract is one of sale if three or five of the points made in the brief to prove it such were shown to be erroneous?

14. There is no warrant for the suggestion that the contract of July 1, 1925, is opposed to the legislative policy of Congress, or that the congressional policy which underlies Section 6 is any broader than that expressed therein.

The Municipality did not possess and could not generate a supply of electric energy equal to the requirements of its inhabitants. The City energy is only about one-half of that required to supply the San Francisco load. (Vincent, R. 295:4-6.) The Municipality's deliverable output of energy is from 67,000 kilowatt hours (Vincent, R. 295:26) to 73,000 or 74,000. (Vincent, R. 303:18.) In winter evenings the peak load is about 225,000 (Vincent, R. 295:23) and the Municipality's contribution would therefore not amount at those times to one-third of the requirements.

House Report 41, supra, p. 41, says that "The power potentiality of the stream is estimated at 115,000 horsepower in its ultimate development. It is proposed to de-

velop this energy in 10,000 horsepower units, and use the power for public purposes in San Francisco and adjoining cities".

If we assume that one horse power is equivalent to 750 watts, 115,000 would be equivalent to 86,250 kilowatts. (One horse power is equal to 746 watts only.) This figure is comparable to the Municipality's deliverable output just mentioned and is far below the present electric energy requirements of the inhabitants of San Francisco.

Congress did not expect that the development of electric energy would equal the potentiality of 115,000 horse power for many years following the passage of the Act. The obligation imposed on the Municipality to generate electric energy was limited to 60,000 horse power (45,000 kilowatts) within twenty years "from the date of the completion of said portion of the works"; 10,000 horse power (7500 kilowatts) within three years; 20,000 (15,000 kilowatts) within ten years; 30,000 (22,500 kilowatts) within fifteen years; and 60,000 (45,000 kilowatts) within twenty years. (Raker Act s. 9, ss. (m), R. 29, 30.) (We assume these periods of time are to be computed, in the circumstances which happened, from, say, July 1, 1925.)

"Nothing whatever is said in the Raker Act with reference to the acquisition or construction of a distributing system within the City of either water or electric energy." (Opinion, CCA., R. 664, lines 5-7; 106 F.2d 571, c. 2 foot.) On July 1, 1925 "the City had no distributing lines or system and had not completed its transmission lines

beyond Newark" but "it had constructed its power plants and had impounded water sufficient to generate a large amount of electric energy which would be wholly lost if the water, as it passed through the dam and canals of the Hetch Hetchy project, were not utilized for that purpose. In this situation, on July 1, 1925, a contract was entered into between the City and the Company providing for the distribution, through the facilities of the Company, of the electric energy generated at the Moccasin power plant of the Hetch Hetchy project". (Opinion, CCA., R. 665, line 20 to 666, line 2; 106 F.2d 572, c. 1, lines 39-54.)

All that the Company was to receive under the agreement was "compensation covering its operating expenses and use of capital".[13] Opinion, CCA., R. 667, lines 16-17.)

The price and terms under which the energy was to be distributed to the inhabitants of the Municipality were fixed in the agency agreement, and the Municipality's absolute control over the situation was made doubly sure

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[13]This was proved by the testimony of N. Randall Ellis, Chief Valuation and Rate Engineer for San Francisco, attached to the City Attorney's Office (R. 435). A question was put to Mr. Ellis whether, in his opinion, the allowance to the Company under the contract, "represented the actual expense" of the Company in distributing the electric energy, "including a reasonable return on the capital required for that purpose", and he answered "Yes". An objection was then made to the question and was sustained, but no motion was made to strike the answer. We claim that, in the absence of a motion to strike the answer, it is evidence in the case. Moreover, the answer did no more than sum up previous testimony (R. 435) given by Mr. Ellis without objection. We claim that the question to which the objection was sustained, was pertinent, and, in any event, the ruling of the Court in sustaining the objection is here for review. (106 F.[2d] 572, col. 2, lines 47-49.)

by the one day right of termination. The Company had no alternative but to furnish the additional electric energy, which added to the municipal energy, would equal the requirements of the inhabitants of San Francisco.

There is no manifestation of congressional purpose which would be set at defiance by this simple and unavoidable expedient. "The arrangement made was a practical method of utilizing a public utility corporation as an agent to distribute power generated by the city to its customers in the city." (Opinion, CCA., R. 670 ft.; 106 F.2d 573, c. 2 ft.)

There is nothing in Section 6 which requires that municipal energy shall be sold directly to consumers without the intervention of an agent.

There is a marked difference between public ownership and public operation. Obviously, Section 6 does not command public operation and there are no prohibitive words therein which would drive the Municipality thereto, leaving it no alternative.

The idea that Section 6 required the Municipality to operate its own distributing system was rejected in the Opinion of Secretary Ickes as follows (R. 244:19-27):

Secretary Ickes' Opinion.

"The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, **while true** (see Uhl v. Badaracco, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Fran-

cisco by a mandatory Congressional enactment." (Underlining ours.)

Congress has power to adopt a legislative policy, and it alone has power likewise to determine just what concrete measures in line with that policy shall be enacted.

It is not for the Government to cast about for a legislative policy and then argue that unmistakable concrete enactments in line with that policy shall be enlarged so as to make them commensurate with the real or supposed legislative policy.

In Brief for the United States, (p. 14) House Report No. 41 is quoted for the following comment on Section 6; "This provision, acquiesced in by the grantee, was designed to prevent any monopoly or private corporation from hereafter obtaining control of the water supply of San Francisco."

As we have shown, supra, pp. 42-43, this comment applied not to the first clause of the section but to both clauses and was addressed to the then form of Section 6 in H.R. 7207, which, however, for present purposes was not vitally changed in the enacted law.

The words of Section 6 are to have the meaning which like words had in the letter of June 25, 1906, President Theodore Roosevelt to the Secretary of the Interior (R. 657-660), and in Section 6 of The Owens River Grant to Los Angeles. "In ascertaining that [the legislative] purpose, we may examine . . . the source in previous legis-

lation of the particular provision in question." (*United States v. Katz*, 271 U.S. 354, 357.)

There is no provision in the Raker Act applicable to the point in hand except the prohibition of Section 6, and we submit that it meant in 1913 what it meant in 1906—just that and no more.

The Government quotes language used while the Raker Act was under discussion in the Senate, but none of the quotations had anything to do with the meaning of or the purpose to be achieved by Section 6. These are so clear that they do not stand in need of interpretation or resort to Congressional debates. (See quotation from Brief for Plaintiff, United States, November 1, 1937, D. Ct. supra p. 5.) Moreover, these debates cannot be resorted to in the circumstances here present. (See authorities, supra, Points 7 and 8, pp. 91-96.)

If Congress had intended to impose upon the Municipality a capital expenditure for constructing a distributing system for electric energy at a cost of tens of millions of dollars it would have said so. There is no provision in the Act which justifies in the remotest degree the assumption that it was the intention or purpose of Congress to do so and there is no language appropriate to express such an imposition. Hence Section 6 cannot be interpreted so to require such an expenditure, either in direct terms or by necessary effect. It is to be noted that whenever Congress desired to impose an obligation upon the Municipality, it said so. (See House Report 41, supra, pp. 36-45.)

A requirement that San Francisco provide its own system for distribution of the Hetch Hetchy energy, would have meant that it provide a system to distribute a fraction small at the beginning and never one-half of electric energy required by the inhabitants of the municipality; the remainder of the necessary energy, and the system to distribute it, to be provided by the Company or companies then or thereafter in the field.

It will be recalled from the opinion of the Circuit Court of Appeals, supra, p. 166, that there is no provision in the Raker Act which called for the construction of a distributing system for either water or electric energy. Congress was aware that the Municipality had "arranged for an amicable condemnation proceeding to acquire the property of the Spring Valley Water Company" (supra, p. 43), but it did not impose the duty upon the Municipality to acquire the system. It left the whole subject at large to be dealt with by the Municipality in a manner best suited to its interests, limiting its prohibitions to (a) sale for resale and (b) sale or assignment of the grant, both covered in Section 6. This is true in a far greater degree in respect of electric energy. Indeed, the first four Hetch Hetchy bills introduced by Mr. Raker copied Section 6 of The Owens River grant and the prohibition applied to water only. The prohibition was enlarged by amendment of the fourth bill so introduced, to cover electric energy as explained, supra, p. 9, footnote 9.

The first portion of Section 6 was merely to guard against sales to others for resale, thereby imposing on the consumer the burden of a profit to the second owner i.e., the one making resales. Notwithstanding the Municipality's acquiescence in provisions imposing burdens upon

it (House Report 41, pp. 36-45, particularly p. 40, last paragraph, p. 43, lines 1-4, 22-25) there was no request by Congress that the Municipality should agree to acquire a distributing system nor any representation by it that it had any specific intentions which would involve a municipally owned distribution system. Congress was not concerned with the means to be employed by the Municipality to deliver municipally generated power to the inhabitants of the Municipality and made no provision respecting the same.

There is no warrant for the idea that the prohibition in Section 6 was in furtherance of a congressional policy to prevent private capital from making a profit out of the utilization of the electric energy, and it is impossible to read into Section 6 a congressional intention that distribution through an agency contract should be prohibited. Therefore, as we have already argued, there is no warrant for giving to Section 6 a broader meaning than its fair reading will allow. If, however, we should go a step farther, we would be warranted in saying that the contract in this case violates none of the policies imputed to Congress in the Brief for the United States.

The Company has no monopoly of the Hetch Hetchy energy; as agent it takes delivery for the infinitesimal period of time necessary to transmit the energy thirty-five miles to San Francisco, using its facilities to render it available to consumers, and collects the price therefor prescribed by the City in the contract, to wit, the lawful rates established by public authority in California. Under the law there can be no rates except those lawfully established.

The Company retains from the collection an amount which pays it, in addition to its operating expenses, a reasonable charge not for the utilization of the public lands granted to the City but for the utilization of its own distributing system in San Francisco, and pays the balance collected to its principal, the Municipality.

The City can terminate this relationship on one day's notice. It has the power of eminent domain. It can acquire the Company's plant by purchase or condemnation whenever its electors authorize such acquisition. It can duplicate the Company's plant with a competing system if it desires.

The Municipality has received for its energy (July 1, 1925–December 31, 1939) in excess of $30,000,000. The figure to December 31, 1937 was $26,000,000 (Vincent, R. 299), and if we add in excess of $2,000,000 per annum for two additional years, we have the figure stated. This is under a contract which the Municipality has always had the right to cancel on one day's notice.

The rates paid are those approved by the State Railroad Commission and there is no suggestion that they are unreasonable.

When the Act was passed in 1913 the Railroad Commission, with enlarged powers, had been in operation for two years only, but when the contract was made in 1925 it had been in operation for fourteen years.

In the Brief for the United States, p. 14, it is said that "it had long been the policy of the Government to preserve the national parks inviolate from private commercial exploitation". To this we say that no private or other commercial exploitation is involved. The Moccasin Power House is on privately owned property of the Municipality over seven miles from the Stanislaus National Forest and over twenty-three miles from the Yosemite National Park. The Moccasin Power House is ninety-six miles from the Company's substation at Newark. The Company's operations under the agreement do not involve any use whatever by it of public lands.

15. There is no merit in any other argument made in the Brief for the United States to establish the contention that the contract of July 1, 1925 is not a contract of agency, or (as expressed by the Government) that it is a contract constituting a grant, upon a consideration, of the right to sell.

(a) The only point ever in dispute respecting the nature of the agreement of July 1, 1925 was whether it is a contract of sale for resale or a contract of agency. There had been no suggestion before the filing of the Petition for Certiorari that it was anything other than one or the other of these two. The artificiality of the argument in the Brief to support the contention that the contract grants a right to sell, is shown by the fact that it is masked in language inappropriate to the subject dealt with.

One would be quickly understood if he said A has appointed B his agent with authority to sell.

The language of the Brief (p. 20, lines 23-26) that "for this consideration . . . the City has granted the Com-

pany a valuable contract right to sell the energy" when the fact is that the City made an agreement with the Company whereby the latter, as agent of the former, would perform the acts specified in the agreement, is far fetched, inexact and incorrect; yet it is repeated in one form or another many times. (supra p. 164.)

To say that in the agreement here involved the City "has for a consideration endowed the Company with a valuable contract right to sell the City's energy" (Brief, p. 10, lines 19-21) is a caricature of language.

(b) While the Brief so often uses the term "grant" in describing what took place under the contract of July 1, 1925, it does take account of the word "selling" in dealing with the statute, and (in order to conjure up a "sale") finds it necessary to supply a consideration for the grant, which it does, in the assumption in the agreement of an obligation by the company to furnish peak load and steam stand-by services and to pay a fixed minimum of energy each month, etc. (p. 20, lines 12-18.) Thus an agency agreement wherein the agent agrees to perform certain duties is turned into a sale of "the right to sell" and the consideration supplied by covenants of the agent in the agreement. Note may be here taken of the following sections of the California Civil Code (in force until 1931 when superseded by the Uniform Sales Act), which clearly codified the general law as it then was and now is:

> "1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property."
>
> "1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for

another, neither thing, or both things, being money only."

"1806. The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and a buyer as to that which he takes."

(c) It is said (Brief, p. 17, lines 15-18) that "In granting to the Company for a consideration the right to sell the energy, the City has violated both the letter and the purpose of the Act". The City did not grant the right to sell; it gave an agent certain powers, and it did not seek to "avoid the requirements of the law" (p. 23, footnote 12) as is shown by its effort immediately after the execution of the agreement to have an authoritative ruling that the contract was one of agency and therefore not forbidden by the statute—a ruling that was not forthcoming until 1935, ten years after the execution of the agreement.

(d) The Brief for the United States (p. 22) takes the opinion of the Circuit Court of Appeals to task for invoking the rule that a sale by an agent is a sale of the principal. The Government says that the rule is a legal fiction. That it may be a legal fiction in certain instances does not detract from its operative force in this case and the rule clearly reflects the physical fact.

16. Even if the contract of July 1, 1925 were in violation of Section 6 of the Raker Act, the Government would not be entitled to the relief which it here seeks.

We come now to a consideration of what the District Court described as "secondary defenses".

(a) Section 6 is not to be considered or treated as a law of the United States passed by Congress in the exercise of its legislative powers.

The prohibitions of Section 6 are not within the law-making authority of Congress and the enactment of them, standing alone, would have been an unconstitutional invasion of the rights of the State and one of its chief political subdivisions.

In dealing with the Oregon railroad land grant, it was said in *Oregon & Cal. R. R. Co. v. United States*, 238 U. S. 393 (1915) "that this court has especially said that railroad land grants have the command and necessarily, therefore, the effect of law" (p. 415, lines 34-36), and that "it is to be remembered the acts are laws as well as grants and must be given the exactness of laws". (p. 422, lines 22-24.)

Reading this decision in the light of its facts, it is not in conflict with *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), where it is said (p. 474) "that the land laws are not of a legislative character in the highest sense of the term (art. 4, §3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal'. Butte City Water Co. v. Baker, 196 U. S. 126".

In relying on the *Oregon* case as authority for its argument, the Government lays on one side the rule that every decision must be read in the light of the facts of the case in which it was pronounced.

The Oregon railroad grant was made in 1866.

At that time there were three transcontinental lines projected or in course of construction to the Pacific Coast, one by a northern route, one by a central and one by a southern. The construction of these transcontinental lines was a matter of great national purpose and concern. The construction of the transcontinental lines made it a matter of supreme national importance that a line paralleling the Pacific Ocean (as near as might be) from the northern to the southern boundary of the United States should be built for interconnection of and intercommunication amongst the Pacific Coast states as well as to afford connection with transcontinental lines at northern, southern and central points as we have them today.

The national purpose of the Oregon railroad land grant was recognized in *Oregon & Cal. R. R. Co. v. United States*, 238 U. S. 393 (1915); for mention is there made of "lands granted for national purposes" (p. 414, line 13) and as "part of the national purpose" (p. 416, line 25), and was "intended to continue and complete such national purpose". (p. 416, lines 35, 36.)

In the Raker Act, the purpose was local; it was important, but local; it was concerned with a municipal water supply for and the generation of electricity as a by-product by one of the leading cities of the country. Over the municipal affairs of that City, Congress had no law-making jurisdiction whatever. What it did in enacting

the Raker grant was merely to pursue the course of a good neighbor; one that might reasonably have been expected from the sovereign in dealing with one of its important municipalities. The grant to the City was upon an adequate consideration.

The provision forbidding the municipality to sell water or electric energy with the right to resell the same, could not have been enacted by Congress as a law independently of the grant and the provision is not to be here treated as a law enacted under law making power.

In respect of the disposition of the public domain, laws may be enacted totally unconnected with any particular grant, as in *Ruddy v. Rossi*, 248 U. S. 104 (1918), where the Court gave effect to an act of Congress which provided that no lands acquired as a homestead should become liable in execution for any debt of the patentee contracted prior to the issuance of the patent. (See Opinion of Mr. Justice Holmes in the case) (pp. 107-111.)

Congress may also as a party in a particular grant, introduce into the act, provisions which have the force of public law if the subject matter is within its constitutional law making power. The Oregon land grant is an instance but the Raker Act is not.

In every case where a granting statute is involved, it may become necessary to know whether provisions in the granting act are intended to be in the exercise of law making power or merely provisions inserted in a grant by the owner of the property to express the terms upon which he is willing to part with title. If it is ascertained that Congress did not intend to exercise its law making power by the insertion of a given provision in a grant of pub-

lic domain, that is the end of the question. On the other hand, if it is said that Congress did intend to exercise its legislative authority in inserting a particular provision in the grant, it becomes necessary to ascertain whether the particular provision is within the constitutional law making power of Congress.

There is nothing in the Raker Act which indicates an intention on the part of Congress to make the prohibition of Section 6, with which we are dealing, a matter of law, referable to the law making power. It is obvious that it was intended otherwise, i. e., as a provision in a grant of lands and interests in lands made by the owner of the lands to the grantee.

See Appendix hereto, p. xxvii, for the views expressed in Congress upon this point.

Senator Borah, speaking in opposition to the enactment of the Raker Act in the Senate December 5, 1913, discussed various provisions of the Act, and, among other things, said (51 Cong. Rec. 286 c. 2):

> "I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land, and I have no doubt of the proposition that the Government can attach no other conditions than an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government."

Uhl (a taxpayer) v. Badaracco, et al. (Supervisors and Mayor of San Francisco), 199 Cal. 270, 280 (1926) dealt

with the very question we are here considering, i. e., the authority of Congress as a law making power to enact the prohibitions of Section 6. The case arose after the contract here under review, i. e., that of July 1, 1925, between the City and the Company, had been in operation for more than one year; and involved the authority of the City to use the revenue collected under the contract to buy or build new power plants. The Court held that the City should apply the revenues from the Hetch Hetchy project (a) first to the payment of operating costs, and (b) the balance to the service charges on the Hetch Hetchy bond issues. The defendants (Supervisors and Mayor of the City) argued that in view of the prohibitions of Section 6 of the Raker Act the City was entitled to use the revenues from the project to build publicly owned power plants.

The Supreme Court of California held (p. 280):

> ". . . Congress has no power to create or force a public utility upon the City, and under the organic law of the City a public utility can be acquired only in one of two ways: First, from funds derived from taxes levied for that purpose; second, from funds derived from the sale of bonds issued for such purpose."

We submit that the provision cannot be supported as a law of the United States enacted under the law making power granted to Congress but must be dealt with on the basis of contract only.

(b) If Section 6 be regarded as a provision in a contract between the United States and the Municipality, it is invalid and/or unenforcible.

The general rule is that contracts between the Government and an individual are subject to the same rules of jurisprudence as contracts between individuals.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (Citing cases) (*Lynch v. United States*, 292 U. S. 571, 579.)

"The United States does business on business terms." (*United States v. Nat. Exch. Bank*, 270 U. S. 527, 534, Mr. Justice Holmes.)

"A contract between a private party and the United States for sale of goods by the one to the other is to be construed, and the rights of the parties under it determined, by the same principles as if it were between individuals." (Syl. par. 2.)

"The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. Smoot's Case, 15 Wall. 36, 47; Manufacturing Company v. United States, 17 Wall. 592, 595; United States v. Smith, 94 U. S. 214, 217." (*Reading Co. v. United States*, 268 U. S. 186, p. 188.)

"A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument." (*Hollerbach v. United States*, 233 U. S. 165, 171.)

"If [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there." (*Cooke v. United States*, 91 U. S. 389, 398.)

The prohibition of Section 6 considered as a provision in a contract is invalid and unenforcible because it involves an unreasonable restraint of trade and an unreasonable restriction upon the power of alienation, which is particularly true considering that the restraint is imposed upon a public use.

The Government is prosecuting this action on the basis that Section 6 falls in the category of a restrictive covenant, dealt with in *Oregon & California RR. Co. v. United States*, 238 U.S. 393, syl. par. 2, and p. 419, line 34 to p. 423, line 10.

It is an outstanding rule that a restrictive covenant is contrary to public policy and void, if its enforcement will not benefit and if its breach will not damage the covenantee.

> "Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable." (Tindal, C. J., in *Horner v. Graves*, 7 Bing. 735, 743, 131 Eng. Rep. 284, 287, middle [1831].)

The rule, thus stated in 1831, was adopted by this Court sixty-seven years ago in *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873).

See, also, *Los Angeles University v. Swarth*, 107 Fed. 798, 803; 5 *Williston on Contracts, Revised Edition* (1937), pp. 4553-4699, particularly Section 1636, p. 4580; *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396; *East Jersey Water Co. v. Newark*, 96 N.J.Eq. 231, 98 N.J.Eq. 672; *Los Angeles Investment Co. v. Gary*, 181 Cal. 680; *Wayt v. Patee*, 205 Cal. 46.

(c) The City had no power to enter into a contract with the Government or with anyone else, limiting its freedom in trading in its electric energy, and the Government had notice of the limitation upon the City's power when the contract with it was made.

The City has only such powers as are conferred upon it by its Charter. Generally, it acts through its Board of Supervisors, which constitutes the legislative department of the municipality. The authority of the Board of Supervisors when the Raker Act was passed will be found in Article II of the then Charter. Article VI, Chapter I, Sec. 9, par. 8, read as follows:

> "Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors:
>
> . . . . . .
>
> 8. Of any and all public utilities owned, controlled or operated by the City and County, or which may hereafter be so owned, controlled or operated."

(d) If the prohibitions of Section 6 be held invalid or unenforcible, that fact will have no effect upon the grant.

The provisions of Section 6 are severable and divisible from the remaining provisions of the Raker Act. It follows, then, that the invalidity or unenforcibility of the prohibitions of the provisions of Section 6 would not effect any of the rights granted to the City by the Raker Act. This is in accordance with the universally appli[illegible] rule.

(e) The prohibitions of Section 6 of the Raker Act were not inserted for the benefit of the General Govern-

ment but because the General Government conceived they would benefit the City. What was intended as a shield for, should not in a court of equity be permitted to be turned into a sword against, the City. (*United States v. Farrar*, 38 F.2d 515, 517, c. 2; *Robbins v. Pacific Eastern Corporation*, 8 C.2d 241, syl. par. 18.)

(f) A number of equitable rules also lead to the conclusion that no relief should be granted to the Government herein.

(1) The rule that grants by the Government are, in particular circumstances, construed strictly against the grantee and in favor of the grantor has no application to this case, because the rule applies to gratuitous grants and the grant made by the Raker Act was not gratuitous, but was made for a valuable consideration.

(2) Equity never permits an injunction to be issued to enjoin the alleged violation of a contract provision where (as in the present case) no benefit can accrue from its enforcement to the person seeking to enforce it, and no damage or injury will result to him from its breach.

(3) Injunction will be denied if the Court finds that greater damage or hardship will be caused to the defendant by the granting of an injunction, than will be caused to the plaintiff by the denial of an injunction.

Harrisonville v. Dickey Clay Co., 289 U. S. 334, 337 ft. 338, with marginal notes; *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 71 ft. 72; *Mountain Copper Co. v. United States* (C.C.A. 9), 142 Fed. 625; *Bliss v. Washoe Copper Co*, (C.C.A. 9), 186 Fed. 789; and *McCarthy v. Bunker Hill, Etc. Co.* (C.C.A. 9), 164 Fed. 927.

(4) Although the equitable rule which requires a Court to "balance the equities" of the parties and consider the hardship that will result from the granting or the denial of an injunction was once applied to preliminary injunctions only, and, although there is a division among present day authorities as to whether or not it should be applied to final injunctions, the weight of modern authority applies the rule to final injunctions, as well as to preliminary injunctions. *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 337 ft.-338, with marginal notes; *Di Giovanni v. Camden Ins. Assn.*, 296 U. S. 64, 71 ft.-72.

See cases cited in paragraph (3) supra.

(5) The United States, as a litigant, is bound by the same equitable rules and principles as a private litigant.

(6) Equity does not permit an injunction to be granted except to protect actual or prospective rights in real property or in unique personal property, and (respecting the former class of property), only when the act complained of is in violation of a covenant which concerns an estate or interest in the property. Equity will not interfere to enforce or protect contract rights which are collateral to a grant, but, for the vindication of such rights, will remit the plaintiff to an action at law for damages, which is the recognized remedy for their protection.

(7) It is a general rule of equity that the violation of a naked legal right will not be enjoined, unless the party applying for the injunction will suffer substantial damages if an injunction is denied.

(8) Equity will not permit an injunction to be issued where (as in this case) to do so would prejudice public interests.

It is evident that if the City is forbidden to dispose of the electric energy through an agent it cannot dispose of it at all because it has no distribution system of its own. Under these circumstances the enforcement of the injunction would deprive the City of an income exceeding $2,200,000 per year from the electric energy, and thus greatly prejudice its interest and the interest of its taxpayers, and, in addition, cause the economic waste of electric energy of that great value.

(9) Equity will not decree specific performance of a contract (or conversely enjoin the breach of a contract) where performance of the contract (as construed by the plaintiff) is impossible, or where (as in the present case) performance requires the consent of persons (i.e., the electors of San Francisco) who are not parties to the contract.

If, as argued by the Government, distribution of the electric energy cannot be made through an agent it cannot be made at all, because the City lacks its own distribution system, and cannot acquire one without the consent of its electors who have many times refused to give that consent. It follows, then, that performance of the provisions of Section 6 of the Raker Act (as construed by the United States) is impossible, and, further, that it cannot be made possible without the consent of the electors of San Francisco who are not parties to the contract (i.e., the Raker Act).

17. The District Court erred in sundry instances in rejecting evidence offered by the Municipality.

There are 114 Assignments of Error in the record.

These may be classified as follows:

Assignments Nos. 1 to 7, inclusive (R. 527-532), are based upon the admission in evidence, over objection of the municipality, of documentary evidence, offered by the Government.

Assignments Nos. 8 to 32, inclusive (R. 532-557), are based upon the exclusion of evidence, oral and documentary, offered by the municipality and objected to by the Government.

Assignment No. 33 (R. 557) is based upon the striking out of certain evidence, oral and documentary, offered by the municipality and, theretofore, admitted.

The remaining Assignments, i. e., Assignments Nos. 34 to 114, inclusive (R. 567-623), are, in most part, based upon exceptions to (1) the refusal of the Court to make findings requested by the municipality, (2) the Conclusions and Findings made by the Court and (3) the Decree.

We do not press the first seven Assignments which, as stated, are based upon the admission of evidence as the evidence is in the record.

Assignments Nos. 9 and 10 (R. 533-534) are based upon rulings sustaining objections to questions put to John J. Dailey, in 1925 Assistant City Attorney of San Francisco who drafted the contract of July 1, 1925 (R. 534), respecting (1) a conversation he had in June, 1925, with Mr. John H. Edwards, who rendered the Opinion

of June 8, 1923 and who in 1925 was then either Assistant Secretary or Solicitor of the Department of the Interior, and (2) whether, in drafting the contract of July 1, 1925, he relied upon the suggestion in Mr. Edwards' Opinion respecting distribution of energy through an agent.

These two assignments are not of great importance because we understand the Government concedes that the parties to the contract of July 1, 1925, intended and attempted to make an agency contract; and if the Government does not so concede, the fact is overwhelmingly proved and is not debatable.

Assignment No. 11 (R. 535) is based upon a ruling of the Court, sustaining an objection by the Government to an opinion of Mr. C. Edward Wright, Solicitor of the Department of the Interior, dated July 20, 1925.

Mr. Wright's opinion is referred to in the opinion of Secretary Ickes (R. 234-235) which was admitted in evidence over objection by the municipality. We submit that the reference to Mr. Wright's opinion in Secretary Ickes's opinion made Mr. Wright's opinion admissible, even if it were not, otherwise, admissible.

Assignments Nos. 12 and 13 (R. 536-537) are based upon rulings sustaining objections by the Government to Defendant's Exhibits G and H for identification (R. 536-537), which are, respectively, (1) a statement of the Registrar of Voters of San Francisco showing seven proposed bond issues for electric distribution systems that had been voted on and rejected by the electors of the municipality, and (2) a statement showing (a) the amount of the assessment roll of the municipality; (b) the constitutional debt limitation of the municipality, and (c)

related matter. These exhibits were offered in support of the defense that limitations imposed upon the municipality by the Constitution of California and by its own charter, made it legally impossible for the municipality to acquire a municipal system for the transmission and distribution of the Hetch Hetchy energy without the approval of its electors, who had, seven times, refused to give their approval. We submit that the evidence should have been received.

Assignments Nos. 14, 15 and 16 (R. 538-540) are based upon rulings which excluded Defendant's Exhibits I, J and K for identification, the first two of which were resolutions of the Board of Supervisors of the municipality. If, as we claim, it was legally impossible for the municipality to comply with Section 6, as construed by the Government, injunctive relief should have been denied because the granting of such relief was tantamount to requiring the Municipality to accomplish the impossible or lose a large part of the return from its investment. By the resolutions, the municipality solicited offers by municipalities and municipal Water Districts and Irrigation Districts for the purchase of the whole or part of the Hetch Hetchy energy, and requested from the power companies in San Francisco the terms upon which they would distribute the Hetch Hetchy electric energy under an agency contract for a period not exceeding ten years, or would sell (for cash or upon terms) such portions of their respective distribution systems as were adapted to the distribution of the Hetch Hetchy energy by the municipality, etc. Exhibit K was made up of the negative replies of the power companies to the questions put to them.

The two resolutions were offered to prove (1) compliance with Sec. 9(1) of the Raker Act which gave municipalities and municipal Water Districts and Irrigation Districts the right to purchase Hetch Hetchy energy not required by San Francisco for its own use, and (2) compliance with the provisions of San Francisco's charter which required it to take the steps mentioned, as a condition precedent to the acquisition of a municipally owned system for the distribution of the Hetch Hetchy energy. Furthermore, the evidence supported the Municipality's defense that it was legally impossible to comply with Section 6 of the Raker Act, as construed by the Government.

We submit that the three exhibits were admissible and that the Court erred in excluding them.

Assignment No. 17 (R. 540) is based upon a ruling which excluded a resolution of the Board of Supervisors declaring that it would be the policy of the municipality to furnish such standby electric service and electric energy (within limitations) as might be required by Modesto Irrigation District.

The resolution was adopted in response to a request from Modesto Irrigation District for a declaration of policy such as was made in the Resolution; as shown by its context, the resolution recognized the rights accorded the Irrigation District under Section 9 (l and m) of the Raker Act. We submit, that the exhibit should have been received.

Assignments Nos. 18 and 19 (R. 541-544) are based upon an effort of the municipality to prove that the Hetch Hetchy energy delivered under the contract of July 1,

1925, is less than the total demand of San Francisco consumers, and that if it were subtracted from the total amount of energy used in San Francisco, from all sources, the amount of electric power in Northern California would be shortened and the supply necessary for consumers would be endangered and make necessary the construction of additional power plants.

The matters so sought to be shown were abundantly shown, elsewhere, and cannot, now, be said to be a matter of dispute. For this reason, we pass these assignments. Although we desire to point out that the evidence to which the Assignments refer had cogent force in making applicable the general equitable rules upon which the Municipality relied to support its claim that in the circumstances of the case, it would be an abuse of discretion to grant injunctive relief.

Assignments Nos. 21 and 22 (R. 544-546) are based upon rulings which rejected evidence that it would cost the municipality $60,000,000 to acquire a transmission line from Newark to San Francisco and distribution and standby systems.

This evidence was offered in support of the municipality's defense that it was and had been legally impossible for it (in view of Constitutional and Charter limitations upon its debt-incurring capacity), to acquire a municipal transmission line and distribution and accessory systems. We submit that the Court erred in rejecting the evidence.

Assignments Nos. 23 and 24 (R. 546-549) are based upon rulings which rejected evidence that at the time of the enactment of the Raker Act and for many years prior thereto, it had been the plan of the Municipality to

pump the Hetch Hetchy water over the Coast Range Mountains, and, in so doing, to utilize the greater part of the electric energy that might be developed in the Hetch Hetchy project and that not until some three years after the enactment of the Raker Act, was it ascertained that it would be possible and practical to tunnel the Coast Range Mountains and bring the Hetch Hetchy water into San Francisco by gravity flow, thereby making available for disposition a greater amount of electric energy than would have been available, if the original plan of utilizing the energy for pumping had been carried out.

This evidence was offered to show that it was never intended by Section 6 of the Raker Act to require direct municipal distribution of Hetch Hetchy energy because, at the time of the enactment of the Raker Act, the amount of Hetch Hetchy energy, which it was then believed would be available for use by San Francisco consumers was so small that it never could have been "intended" to force the municipality to acquire its own transmission line and distribution system, for the distribution of the small amount of energy.

Assignment No. 25 (R. 549) is based upon a ruling sustaining an objection by the Government to a question put to N. Randall Ellis, a witness for the municipality.

We submit that the question was a proper one and that the ruling of the trial Court in sustaining the objection thereto was erroneous. If this be true, the answer of the witness should be allowed to stand. A question was put to Mr. Ellis whether, in his opinion, the allowance to the Company under the contract "represented the actual expense" of the Company in distributing the electric energy,

"including a reasonable return on the capital required for that purpose", and he answered "Yes". An objection was then made to the question and was sustained, but no motion was made to strike the answer. We claim that, in the absence of a motion to strike the answer, it is evidence in the case. Moreover, the answer did no more than sum up previous testimony (R. 435) given by Mr. Ellis without objection. We claim that the question to which the objection was sustained, was pertinent, and, in any event, the ruling of the Court in sustaining the objection is here for review. (106 F. (2d) 572, col. 2, lines 47-49.) The evidence was important, because it demonstrated that no profit is being made by the Company out of the Government's grant considering that the service which the Company renders returns to it only the bare cost of the service and a reasonable return on the capital used in rendering it.

Assignments Nos. 26 and 27 (R. 550-553) are based upon the sustaining of objections by the Government to two decisions of the Railroad Commission of California in valuation proceedings brought by the municipality in respect of the properties of the Great Western Power Company and Pacific Gas & Electric Company, in which the Railroad Commission fixed the value of the Great Western properties at $11,815,000.00, and of the Pacific Gas and Electric properties at $26,880,000.00.

These decisions were offered to show action taken by the municipality (as required by its charter), to acquire the transmission, distribution and standby systems of the one and/or the other of the two companies mentioned, in order that the municipality might have a municipally owned transmission and distribution system wherewith to distribute the Hetch Hetchy energy and in connection

therewith counsel for the municipality offered to prove that bond issue propositions for the acquisition of the properties of the respective power companies had been submitted to the electors in the year 1930 and had been defeated.

The rejected evidence had to do with the municipality's defense of legal impossibility of performance and with the defenses based upon rules of equity which require the denial of injunctive relief, in circumstances such as shown in this case. We submit that it should have been received, and that the ruling of the Court, which excluded it, is erroneous.

Assignments Nos. 28 and 29 (R. 553-555) are based upon the rejection of evidence showing the amount of bonds authorized and sold by the municipality for governmental purposes between the fiscal year 1924-1925, and the year 1927; the changes in San Francisco's bonding capacity resulting from the issuance of said bonds, and its resultant legal inability to issue general obligation bonds in an amount sufficient to cover the cost of a municipally owned distribution system, in view of Constitutional and Charter debt limitations and related matters.

This evidence was offered in support of the municipality's defense of legal impossibility to acquire a municipally owned transmission and distribution system. We submit that it was proper and should have been received.

Assignments Nos. 30 to 32, inclusive, (R. 555-557) are based upon the rejection of evidence to show that all of San Francisco's water rights were acquired under California laws, and that none of them was acquired from the Government under the Raker Act or otherwise and, con-

sequently, the utilization and generation of such water rights for the generation of electric energy is not subject to the control of Congress.

We do not dwell upon the Court's error in rejecting this evidence because the Government does not contend that the municipality acquired any water rights through the Raker Act. In fact, the Raker Act contains no grant of water rights. On the contrary, Section 11 of the Act, in terms, recognizes that the municipality's water rights must be acquired in accordance with the laws of California. Moreover, House Report 41 (supra, p. 38) and Congressional discussions (appendix p. xxvii) make it clear that San Francisco's water rights were acquired under the laws of California.

Assignment No. 33 (R. 557) is based upon the striking out of evidence previously received and having to do with (1) the value of the property received by the municipality from the Government and that conveyed by the municipality to the Government, and the cost of constructing trails, roads, etc., as required by the Raker Act; (2) a letter of Secretary Work to the Municipality dated May 18, 1928, (R. 327) which apparently approved (R. 333) the contract of July 1, 1925; (3) the amount of bonds issued for the Hetch Hetchy project as of July 1, 1925, and the bond limit of San Francisco for future debt as of said date (R. 369-372); and (4) the fact (R. 388) that loss of the amounts received by the municipality under the contract of July 1, 1925, would require an increase of $.28 per $100.00 in the municipal tax rate.

We submit that the evidence so stricken out was relevant to show, first, that the grant made by the Raker Act was upon a valuable consideration; second, acquiescence by the Interior Department in the contract of July 1, 1925; and third, the great detriment to the municipality (without any benefit to the Government) that would result from enjoining distribution under the contract of July 1, 1925. It follows, then (so we submit) that the ruling which struck out the evidence was erroneous.

Nearly all of the foregoing Assignments of Error, based upon the refusal to admit or the striking out of evidence, offered by the Municipality, had a direct bearing upon the contention of the Municipality that equitable rules required a denial of injunctive relief in the case, inasmuch as the alleged violation of the Raker Act, of which the Government complains, has to do not with a condition attached to the right granted but only to a collateral covenant in the grant.

The remaining Assignments, i.e., Nos. 34 to 114, inclusive, (R. 567-623) are based upon (1) the denial of certain motions of the municipality; (2) the refusal of the Court to make findings as requested by the municipality; (3) exceptions to the findings and conclusions made by the Court, and (4) exceptions to the Decree.

The exceptions to the findings and the decree and the refusal of the Court to make findings requested by the municipality, involve the construction of Section 6 of the Raker Act or the contract of July 1, 1925, and, in one form or another, have already been discussed.

18. **Conclusion.** It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

JOHN J. O'TOOLE,
City Attorney of Respondent;

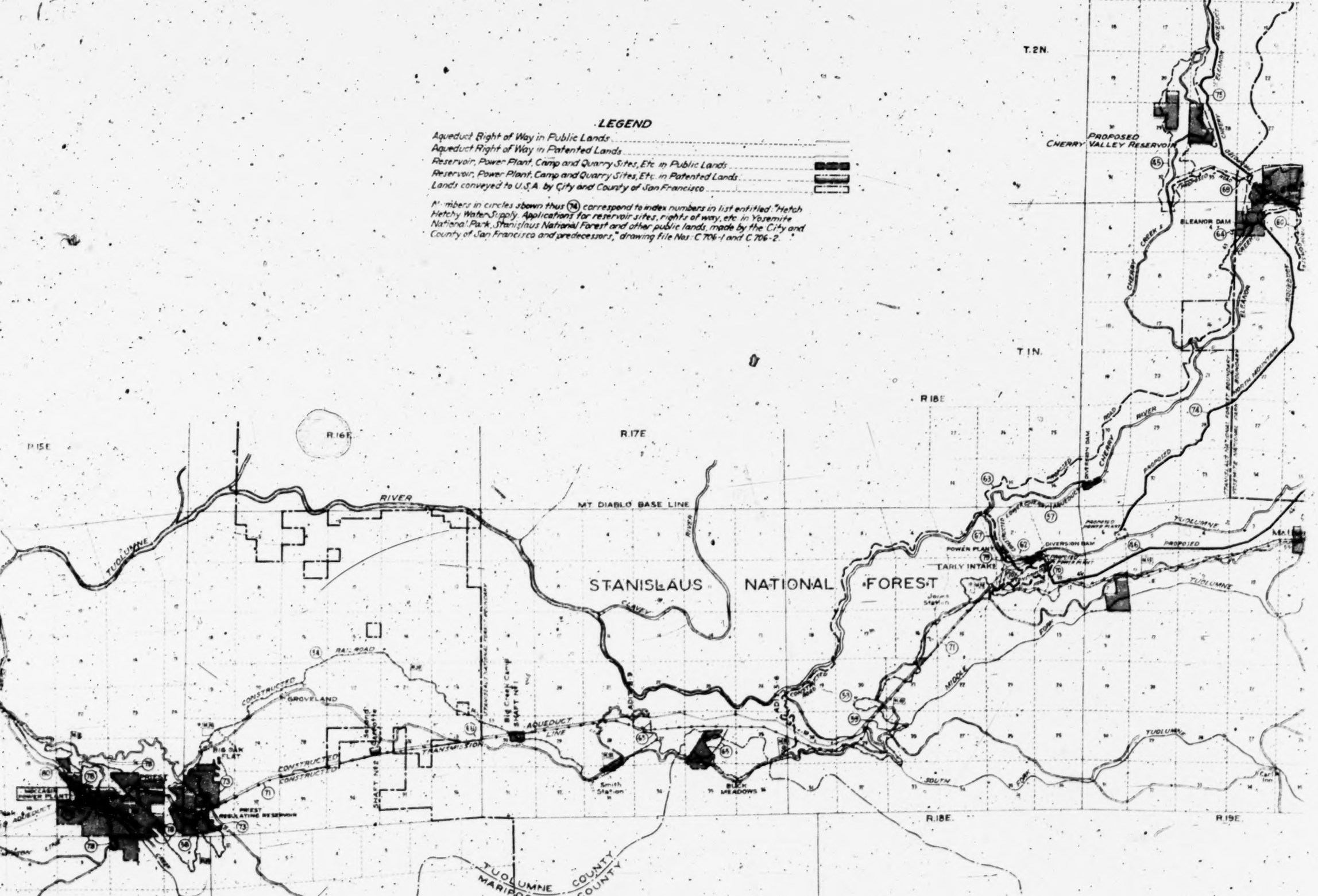
DION R. HOLM,
Assistant City Attorney of Respondent;

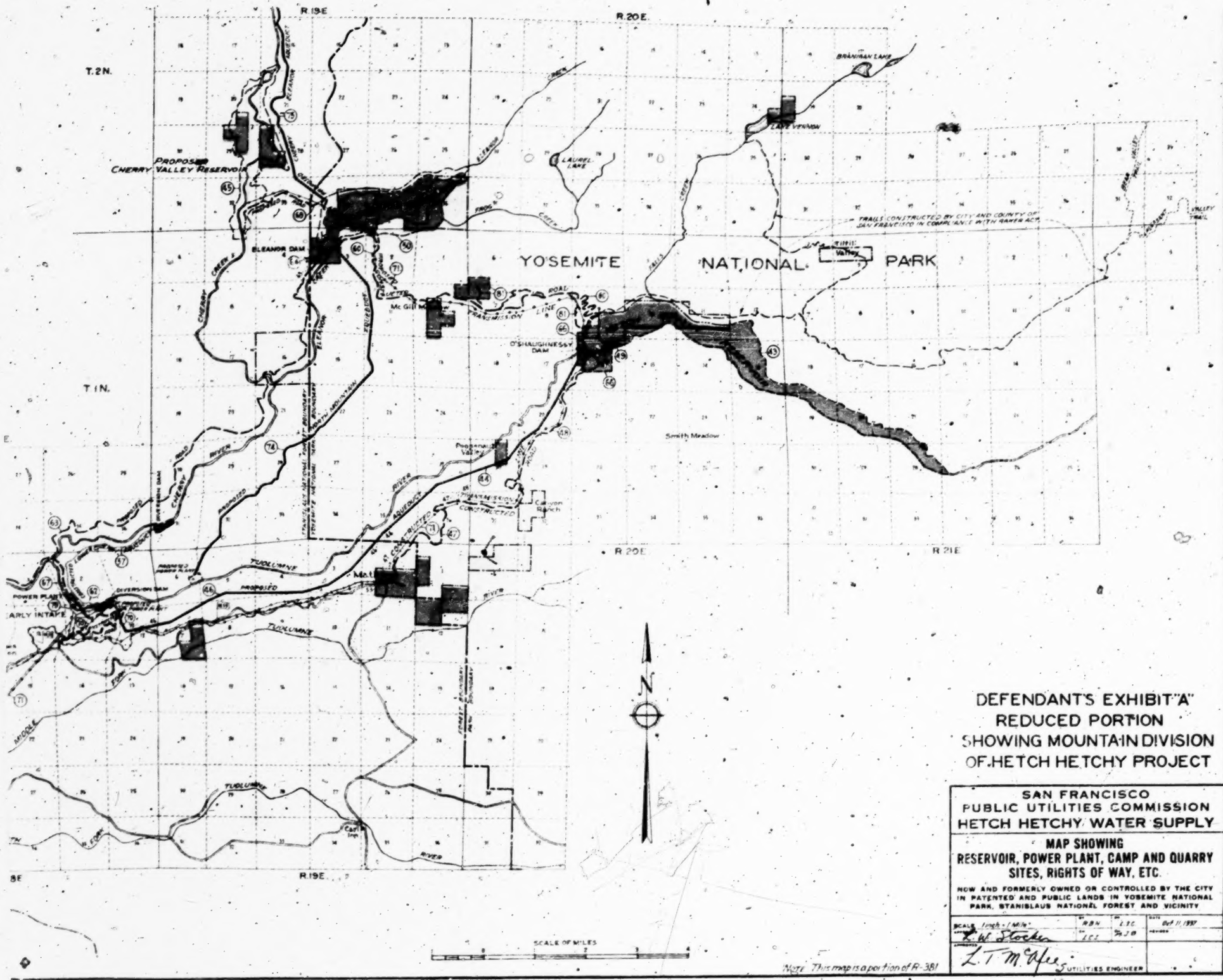
ROBERT M. SEARLS,
Special Counsel of Respondent;

GARRET W. MCENERNEY,
Counsel for Respondent.

San Francisco, March 15, 1940.

[Map Follows]


LEGEND
Aqueduct Right of Way in Public Lands
Aqueduct Right of Way in Patented Lands
Reservoir, Power Plant, Camp and Quarry Sites, Etc. in Public Lands
Reservoir, Power Plant, Camp and Quarry Sites, Etc. in Patented Lands
Lands conveyed to U.S.A. by City and County of San Francisco
Numbers in circles shown thus (74) correspond to index numbers in list entitled "Hetch Hetchy Water Supply. Applications for reservoir sites, rights of way, etc. in Yosemite National Park, Stanislaus National Forest and other public lands, made by the City and County of San Francisco and predecessors," drawing file Nos. C 706-1 and C 706-2.
T.2N.
T.1N.
R.15E
R.16E
R.17E
R.18E
R.19E
MT DIABLO BASE LINE
STANISLAUS NATIONAL FOREST
PROPOSED CHERRY VALLEY RESERVOIR
ELEANOR DAM
CHERRY CREEK
ELEANOR CREEK
TUOLUMNE RIVER
PROPOSED DIVERSION DAM
POWER PLANT
EARLY INTAKE
PROPOSED POWER PLANT
RAILROAD
CONSTRUCTED
GROVELAND
BIG OAK FLAT
FOREST REGULATING RESERVOIR
AQUEDUCT LINE
TRANSMISSION
BIG CREEK CAMP
SHAFT No 1
SHAFT No 2
Smith Station
BUCK MEADOWS
MIDDLE FORK
SOUTH FORK
TUOLUMNE COUNTY
MARIPOSA COUNTY



DEFENDANT'S EXHIBIT "A"
REDUCED PORTION
SHOWING MOUNTAIN DIVISION
OF HETCH HETCHY PROJECT

SAN FRANCISCO
PUBLIC UTILITIES COMMISSION
HETCH HETCHY WATER SUPPLY

MAP SHOWING
RESERVOIR, POWER PLANT, CAMP AND QUARRY SITES, RIGHTS OF WAY, ETC.

NOW AND FORMERLY OWNED OR CONTROLLED BY THE CITY IN PATENTED AND PUBLIC LANDS IN YOSEMITE NATIONAL PARK, STANISLAUS NATIONAL FOREST AND VICINITY

SCALE 1 inch = 1 Mile	R.&B.N.	L.T.C.	DATE Oct 11, 1937
APPROVED F.W. Stocker	151	2.30	REVISED
APPROVED L.T. McAfee UTILITIES ENGINEER			

Note: This map is a portion of R-381